

SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 258

**THE BALTIMORE AND OHIO RAILROAD COMPANY;
BOSTON AND MAINE RAILROAD; ERIE RAIL-
ROAD COMPANY, ET AL., APPELLANTS,**

vs.

**THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION AND TEXAS CITRUS
AND VEGETABLE GROWERS AND SHIPPERS**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI**

FILED AUGUST 6, 1952

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1
[fol. 1]

**IN UNITED STATES DISTRICT COURT, FOR THE
EASTERN DISTRICT OF MISSOURI, EASTERN DI-
VISION.**

Civil Action No. 8465(3)

THE BALTIMORE AND OHIO RAILROAD COMPANY; BOSTON AND
MAINE RAILROAD; Erie Railroad Company; Guy A.
Thompson, Trustee of Missouri Pacific Railroad Com-
pany, New Orleans, Texas & Mexico Railway Company,
The Beaumont, Sour Lake & Western Railway Company,
The St. Louis, Brownsville and Mexico Railway Com-
pany, International-Great Northern Railroad Company,
San Antonio, Uvalde & Gulf Railroad Company, San Be-
nito and Rio Grande Valley Railway Company; The New
York Central Railroad Company; The New York, Chi-
cago and St. Louis Railroad Company; The New York,
New Haven and Hartford Railroad Company; The
Pennsylvania Railroad Company; St. Louis Southwest-
ern Railway Company; St. Louis Southwestern Railway
Company of Texas; Texas and New Orleans Railroad
Company; The Texas and Pacific Railway Company;
Wabash Railroad Company, on Behalf of Themselves and
All Others Similarly Situated, Plaintiffs,

vs.

UNITED STATES OF AMERICA, Defendant.

Complaint—Filed March 10, 1952

To the Honorable Judges of the United States District
Court for the Eastern District of Missouri, Eastern Divi-
sion:

Now come plaintiffs, and for their cause of action against
the United States of America, defendant, respectfully
state:

[fol. 2]

I

Plaintiffs are:

The Baltimore and Ohio Railroad Company, a railroad
corporation organized and existing under the laws
of the State of Maryland,

Boston and Maine Railroad, a railroad corporation organized and existing under the laws of the Commonwealth of Massachusetts,

Erie Railroad Company, a railroad corporation organized and existing under the laws of the State of New York,

Guy A. Thompson, a resident of the State of Missouri who is the duly appointed, qualified and acting trustee of the following railroad corporations:

Missouri Pacific Railroad Company,

New Orleans, Texas & Mexico Railway Company,

The Beaumont, Sour Lake & Western Railway Company,

The St. Louis, Brownsville and Mexico Railway Company,

International-Great Northern Railroad Company,

San Antonio, Uvalde & Gulf Railroad Company,

San Benito and Rio Grande Valley Railway Company,

The New York Central Railroad Company, a railroad corporation, organized and existing under the laws of the States of New York, Pennsylvania, Ohio, Indiana, Michigan and Illinois,

The New York, Chicago and St. Louis Railroad Company, a railroad corporation organized and existing under the laws of the States of New York, Pennsylvania, Indiana, Illinois and Ohio,

The New York, New Haven and Hartford Railroad Co., a railroad corporation organized and existing under the laws of the States of Connecticut, Massachusetts and Rhode Island,

The Pennsylvania Railroad Company, a railroad corporation organized and existing under the laws of the State of Pennsylvania,

St. Louis Southwestern Railway Company, a railroad corporation organized and existing under the laws of the State of Missouri,

St. Louis Southwestern Railway Company of Texas, a railroad corporation organized and existing under the laws of the State of Texas,

Texas and New Orleans Railroad Company, a railroad corporation organized and existing under the laws of the State of Texas,

The Texas and Pacific Railway Company, a railroad corporation organized and existing under the laws of the United States,

Wabash Railroad Company, a railroad corporation organized and existing under the laws of the State of Ohio.

[fol. 3]

II

Defendant is the United States of America.

III

This is a suit to enjoin, set aside, annul and suspend a certain order of the Interstate Commerce Commission (hereinafter called the Commission) made and entered January 7, 1952, in a proceeding, instituted by complaint, entitled Texas Citrus and Vegetable Growers and Shippers v. Atchison, Topeka & Santa Fe Railway Company et al., No. 30074, on the Commission's docket. An earlier report and order in that proceeding was dated December 21, 1950, a copy of said report and order being attached hereto as Exhibit 1 and made a part hereof. This report is reported at 279 I. C. C. 671. Subsequent to the issuance of this order, plaintiffs, and other railroads subject to that order, filed a petition with the Commission to reopen the proceeding for further hearing in order to afford them the opportunity of proving, among others, the confiscatory nature of the rates prescribed in said order. Said petition was dated March 16, 1951, a copy of said petition being attached hereto as Exhibit 2 and made a part hereof. Said petition, after several postponements of the effective date of the order, was denied by order of the Commission dated August 1, 1951, a copy of said order being attached hereto as Exhibit 3 and made a part hereof. Thereafter, following several postponements of the effective date of the order, the Commission issued its further report and order on reconsideration dated January 7, 1952, a copy of said report and order being attached hereto as Exhibit 4 and made a part hereof.

Thereafter, and contemporaneously with the filing of an answer to a petition to advance the effective date of said order, plaintiffs and other railroads subject to said order filed a further petition for rehearing to permit said railroads the opportunity of proving the confiscatory nature of the rates prescribed in the order, dated January 7, 1952 (Exhibit 4), a copy of said petition, dated February 15, 1952, being attached hereto as Exhibit 5 and made a part hereof. Said further petition has not yet been acted upon by the Commission. Pursuant to the order of the Commission (Exhibit 4), plaintiffs and other railroads are required to file certain schedules of rates to be effective April 24, 1952, upon not less than 30 days prior filing and posting in the manner provided by Section 6 of the Interstate Commerce Act, as amended (49 U. S. C. § 6).

IV

This suit is brought pursuant to the provisions of an Act of Congress approved June 25, 1948, 62 Stat. 931, 936, 968-970, 63 Stat. 105, 28 U. S. C. §§ 1336, 1398, 2284, and 2321-2325, inclusive, and the jurisdiction of the Court rests upon these statutory grounds.

[fol. 4]

V

Plaintiffs bring this action on behalf of themselves and all other common carriers by railroad similarly situated who are required by the order of the Commission (Exhibit 4 hereto) to publish and make effective certain joint rates. The said common carriers by railroad number approximately 100, and it is, therefore, impracticable to bring them all before the Court. There is here presented a common question of law affecting the several rights of said common carriers by railroad—whether the order of the Commission is lawful—and a common relief is sought.

VI

The complaint before the Commission alleged that the rates on fresh vegetables, in carloads, from origins in Texas to destinations in the United States, other than in Texas, are unreasonable in violation of Section 1 of the Interstate

Commerce Act, and unduly prejudicial to Texas growers and shippers, and unduly preferential of vegetable growers and shippers in Arizona, California and New Mexico in violation of Section 3 of said Act. 49 U. S. C. §§ 1 and 3. The complaint requested the Commission to prescribe rates for the future. The Commission found that the rates assailed did not violate Section 3 but that unreasonableness in violation of Section 1 existed in the rates on certain vegetables, in carloads, from origins in Texas to certain destination territories, as follows:

(1) Carrots, with tops, in carloads, to destinations in official, western trunk-line and southern territories (generally the territory east of the Rocky Mountains other than Texas, Oklahoma, Arkansas and the southern half of Missouri);

(2) Vegetables, fresh or green (other than cold pack) except cabbage, carrots with tops, onions without tops, and potatoes (including sweet potatoes and yams) to destinations in official territory east of Illinois classification territory (generally the territory east of Illinois, excluding the Chicago industrial area in Indiana, and north of the Ohio River).

The Commission thereupon prescribed maximum rates on vegetables by its order of December 21, 1950, as more fully set forth in said order attached hereto and marked Exhibit 1.

VII

By petition dated March 16, 1951. (Exhibit 2), and filed with the Commission on March 21, 1951, plaintiffs and other railroads before the Commission operating in the southwest and official territories, requested the Commission to reopen its proceeding for reconsideration and for rehearing to afford said railroads an opportunity to offer proof in support of their averment that the rates prescribed in the [fol. 5] Commission's report dated December 21, 1950 (Exhibit 1) were confiscatory and if made effective, would deprive these parties of their property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States of America. By order,

dated August 1, 1951, the Commission denied said petition and refused plaintiffs the opportunity of presenting such evidence to it. (Exhibit 3). Said petition for rehearing contained tables showing that the revenue from a substantial portion of the traffic affected by the order, based upon the rates prescribed, would be materially less than the out-of-pocket costs for handling said portion of the traffic as computed by applying the "Formula For Use In Determining Rail Freight Service Costs" prepared by Cost Section, Bureau of Accounts and Cost Finding, of the Interstate Commerce Commission. On January 7, 1952, the Commission issued its further report and order on reconsideration (Exhibit 4). Said report and order states that the petition for rehearing described hereinbefore had been denied and that the Commission's further report on reconsideration would only provide "necessary clarification" of the earlier report and order dated December 21, 1950 (Exhibit 1). Five members of the Commission dissented from this report on the grounds that the prescribed rates stated in the report were "lower than the record warrants." While the report and order dated January 7, 1952 provided for a new method of calculation of the rates prescribed therein, the resulting rates approximate the average of the levels prescribed in the report and order dated December 21, 1950. In a petition dated February 15, 1952 (Exhibit 5), plaintiffs and other railroads subject to the order of January 7, 1952 again requested the Commission to grant a rehearing to afford the parties thereto an opportunity to offer proof in support of their averment that the rates prescribed in the report and order on recommendation were confiscatory and if made effective, would deprive them of their property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States of America. Said petition has not yet been acted upon by the Commission.

VIII

No evidence of the type described in paragraph VII herein, showing plaintiff's costs of transportation and those of other railroads subject to the orders of December 21,

1950 and January 7, 1952 was introduced by plaintiffs or any other party into the record before the Commission in Docket 30074. Such cost evidence does not exist in that record save for plaintiff's offer, and that of other railroads, in two petitions to tender such evidence upon rehearing so as to permit a comparison of said costs with the revenues which would result upon publication of the rates prescribed in said orders. Plaintiffs and the other railroads subject to said orders did not, and could not foresee that confiscatory rates would be prescribed by the Commission in its orders.

[fol. 6]

IX

The refusal of the Commission to grant a rehearing as requested was, and is, arbitrary and capricious and an abuse of its discretion contrary to the provisions of paragraph (6) of Section 17 of the Interstate Commerce Act and deprives plaintiffs of their property without due process of law contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

X

The rates prescribed by said order of January 7, 1952 from Texas on the vegetables and to the territories more particularly described under paragraph VI hereinabove will yield to the carriers affected by the order, including plaintiffs herein, and to each of them, revenue less than the costs of providing the service covered by said rates. Said order, if the rates there prescribed are made effective pursuant thereto, would deprive plaintiffs and all others subject to that order, and each of them, of their property without due process of law, in contravention of the Fifth Amendment to the Constitution of the United States of America.

XI

By reason of the action of the Commission in its order of January 7, 1952, plaintiffs are left without an adequate remedy at law and will be subjected to irreparable damage if the relief hereinafter prayed for is not granted.

Wherefore, plaintiffs pray:

(1) That, pursuant to the statutes referred to in paragraph IV. hereof, there shall be constituted to hear this case a special court of three judges, one of whom shall be a Circuit Judge;

(2) That process issue against defendant, United States of America;

(3) That, after not less than five days' notice to the Attorney General of the United States, the United States Attorney, and such other persons as may be defendants, the Court, after hearing, by interlocutory injunction, enjoin and restrain enforcement of the order of the Commission dated January 7, 1952 (Exhibit 4) pending final hearing and determination of this suit.

(4) That the Court, pending hearing and determination of plaintiffs' application for an interlocutory injunction, by order, temporarily restrain enforcement of the order of the Commission dated January 7, 1952 (Exhibit 4).

(5) That, upon final hearing of this cause, at which time, plaintiffs will introduce the evidence which the Commission refused to hear and which is described in two petitions [fol. 7] (Exhibits 2 and 5), one of which has been denied (Exhibit 3), showing that the rates prescribed are confiscatory, the Court adjudged that the order of the Interstate Commerce Commission (Exhibit 4) is unlawful, beyond the power of the Commission, arbitrary, confiscatory, and if made effective, will deprive plaintiffs of their property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States of America; and that a decree be entered setting aside, annulling, suspending, and perpetually enjoining the enforcement, operation, and execution of said order; and that plaintiffs, and all other common carriers by railroad similarly situated, may have such other and further relief as may be deemed proper by the Court.

Respectfully submitted, Robert H. Bierma, H. D. Boynton, T. O. Broker, J. P. Canny, /s/ Richmond C. Coburn, Frank H. Cole, Jr., L. P. Day, R. B. Elster, R. J. Fletcher, James B. Gray, /s/ Toll R. Ware, Attorneys for Plaintiffs.

Notices and other documents served on plaintiffs should be served on Richmond C. Coburn, 411 N. Seventh, St. Louis 1, Mo., Toll R. Ware, 2008 Missouri Pacific Building, St. Louis, Missouri.

[fol. 8] INTERSTATE COMMERCE COMMISSION

No. 30074

Texas Citrus and Vegetable Growers and Shippers v. Atchison, Topeka & Santa Fe Railway Company et al.

Submitted June 1, 1950. Decided December 21, 1950

1. Rates on carrots from Texas to defined territories, and on certain other vegetables to destinations in official territory east of Illinois and to points in California and Arizona, found unreasonable. Maximum reasonable bases prescribed.
2. Rates on vegetables, in carloads, from Texas origins to points throughout the United States found not shown to be unduly prejudicial.

Frank A. Leffingwell, Austin E. Anson, Willis R. Deines, and Scott Toothaker for complainant.

Charles A. Carr for South Dakota Public Utilities Commission, intervener in support of the complaint.

W. J. Angello and F. L. Partridge for interveners in support of the complaint.

James B. Gray, Robert Thompson, Joe G. Fender, S. R. Brittingham, Jr., Clyde W. Fiddes, James G. Blaine, Wm. E. Davis, Seth W. Barwise, Toll R. Ware, Robert H. Bierma, J. P. Canny, Leo P. Day, A. S. Knowlton, E. A. Hodgkinson, J. E. Lyons, E. L. Van Dellen, James M. Souby, Jr., G. H. Muckley, Stanfield Johnson, and George T. Barry for defendants.

Warren K. Brown and Howard Freas for Public Utilities Commission of the State of California, and Frank C. Brooks, C. B. Moore, John H. Todd, T. R. Phillips, K. L. Vore, and W. G. O'Barr for other interveners supporting defendants.

Robert C. Neill for certain California interests.

Report of the Commission

By the Commission:

Exceptions to the report proposed by the examiner were filed by complainant, defendants, and certain interveners, and the issues were orally argued. Exceptions and requested findings not discussed in this report, nor reflected in our findings or conclusions, have been given consideration and found not justified.

[fol. 8a] By complaint filed September 13, 1948, it is alleged that the rates¹ on vegetables, in carloads, from Texas origins to destinations in the United States, other than in Texas, are unreasonable, unduly prejudicial to Texas growers and shippers, and unduly preferential of vegetable growers and shippers in Arizona, California, and New Mexico. We are asked to prescribe lawful rates for the future.

The principal vegetable-producing sections of Texas are: (1) The lower Rio Grande Valley, including Harlingen; (2) the coastal bend section, including Corpus Christi; (3) the Laredo section; (4) the Eagle Pass-Winter Garden section; (5) the east Texas district, including Tyler; (6) the north Texas section, north of Dallas; and (7) the panhandle district. Groups (1), (3), and (4) generally take the same rates. Harlingen is a representative origin in group (1). Allegedly preferred origins include the winter-vegetable growing areas, embracing the Phoenix and Yuma, Ariz., and the Imperial Valley, Calif., districts, the spring, summer, and fall vegetable group, embracing the remainder of California, and origins in northwestern New Mexico of which Grant is typical. The Phoenix district extends about 9 miles northwest, 30 miles west, and 31 miles east of Phoenix. The Yuma district extends from Araby to Somerton, Ariz., 22 miles, and the Imperial Valley district extends south from Calipatria to Calexico, Calif., 33 miles, including Brawley, Calif. Other producing areas in Cali-

¹ Rates and rate differences are stated herein in amounts per 100 pounds and, except as noted, do not include general increases authorized on and after December 29, 1948, and as such will be referred to as the present rates.

ifornia include Salinas and Watsonville, about 114 and 92 miles, respectively, south of San Francisco, the San Fernando Valley in the Los Angeles district, and the Sacramento Valley northeast of San Francisco.

The complaint assails, but there is no evidence of record relating to, the rates on watermelons. The rates on this commodity are not included in the findings hereinafter made.

The rates from Arizona, California, and New Mexico apply to large groups of eastern destinations. Group A is bounded approximately by the line of the Norfolk and Western Railway Company from Norfolk, Va., to the Ohio River, thence by a line east of Charleston, W. Va., Pittsburgh, Pa., and Buffalo, N. Y., to Lake Ontario, thence by the Canadian border to the Atlantic Ocean. Group B embraces the remainder of West Virginia and Pennsylvania and part of Ohio east of Cincinnati, Springfield, and Toledo. Group C embraces the remainder of Ohio, Indiana, except a small corner near Chicago, Ill., and the Lower Peninsula of Michigan. Group D embraces most of Illinois and Wisconsin and northeastern Minnesota. It does not embrace points on or immediately adjacent to the Mississippi River. Group E extends from the Gulf to the Canadian border and includes most of Louisiana, Arkansas, Missouri, and Iowa, and approximately the eastern halves of South Dakota and North Dakota, and those parts of Illinois, Wisconsin, and Minnesota not included in group D. Groups K, K-1, L, and M, in the order named, beginning at the Atlantic coast, embrace southern territory. Groups F to J, inclusive, are west of group E.

Position of complainant.—The complaint is based primarily on the ground that the assailed rates are on a higher level than those from Arizona, New Mexico, and California, and that, because the north-bound and east-bound traffic from Texas does not traverse mountain-Pacific territory, the Texas rates should be on a level more nearly corresponding to the level from the other States.

Other respects in which the assailed rates are claimed to be unreasonable are that (1) they exceed the value of the service, as indicated by the truck competition from Texas to destinations as far distant as Chicago; (2) the class-rate

adjustment, where applicable, is not appropriate and does not fit the needs of the vegetable movement; (3) it is often impossible to ascertain definitely the applicable rate on vegetables in mixed carloads; (4) to points beyond southwestern territory, from the standpoint of ton-mile earnings they generally are substantially higher than rates from competing points in Arizona, California, and New Mexico; and (5) they are higher than certain rates on commodities other than vegetables. Complainant contends that undue prejudice is established by the generally higher level of the assailed rates than of those on the same vegetables from Arizona, California, and New Mexico, which apply for hauls partly in the higher-rated mountain-Pacific territory; by the higher rates from Texas to Arizona and California than the corresponding east-bound rates over the same line or route from California to Texas; and difficulty which Texas shippers experience in marketing vegetables in competition with the allegedly preferred shippers.

Position of interveners in support of the complaint.—The position of the South Dakota Public Utilities Commission is that the spread in rates from Texas to Sioux City under those to South Dakota destinations is too great. Its witness did not advocate an increase in the rates to Sioux City, nor an increase in the rates from California, New Mexico, and Arizona to South Dakota. The Burlington Shippers' Association is concerned principally with the relation of the combination rates to Iowa and northwestern Illinois, as compared with the truck-competitive rates to [fol. 8c] intermediate southwestern destinations.

F. H. Vahlsing, Inc., a large Texas shipper, proposes that the rates on vegetables from Grants to the East be used as a maximum for rates from Texas, inasmuch as Grants and the Rio Grande Valley are equidistant from official territory.

Description of the traffic.—A wide variety of vegetables are commercially grown in the several Texas districts. Based on carload shipments originated in 1947, the most important and their volume in relation to the total of all Texas vegetables are tomatoes, 23 percent, cabbage, 15.5 percent; onions, 14.1 percent, carrots, 7.1 percent; potatoes, 6.1 percent, and spinach, 5.5 percent. Carload shipments

of mixed vegetables were 21.5 percent of the total. The foregoing constituted 93 percent of the Texas carlot shipments, including boat shipments reduced to carlot equivalents. The important vegetables shipped from California and their relation to total carlot shipments in 1947 were as follows: Lettuce and romaine, 37.1 percent, potatoes, 28.3 percent, mixed vegetables, 9.2 percent, carrots, 8.9 percent, cauliflower, 4.8 percent, tomatoes, 4.6 percent, onions, 2.8 percent. The foregoing represented 95.7 per cent of California carlot shipments in 1947.

Shipments from Arizona in 1947 were lettuce, 63.5 percent, carrots, 16.3 percent, mixed vegetables, 7.7 percent, potatoes, 5.8 percent, cauliflower, 2.4 percent, onions, 1.7 percent. Some cabbage and broccoli were also produced.

Vegetables have been grown in the Grants area since 1939, principally carrots, lettuce, and onions. Plantings of carrots increased from 15 acres in 1939 to 2,100 acres in 1949. Shipments increased from about 500 carloads in 1941 to 1,500 carloads in 1949.

Distances from Texas to the principal consuming territory are much less than from most of the allegedly preferred origins. For example to New York, N. Y., the short-line distance from Harlingen is 2,005 miles, or 1,213 less than from Salinas, 870 miles less than from El Centro, and 642 miles less than from Phoenix. Complainants stress the substantial portions of the hauls from the more distant origins which occur in mountain-Pacific or so-called differential territory. These are 1,351 miles from Salinas, 822 miles from Phoenix, and 331 miles from Grants, N. Mex., on movements to groups A to D. To groups K to M they are 1,168 miles from Salinas and 432 miles from Phoenix.

In 1947, Texas shipped 54,977 carloads of vegetables, including some shipments by boat, and including 32,274 rail shipments from the lower Rio Grande Valley, as compared [fol. 8d] with 29,600 carloads from Arizona, 145,308 carloads from California, and 1,460 carloads from New Mexico. All other States shipped 321,978 carloads.

As to some of the principal vegetables shipped from Texas, total carlot shipments increased to a lesser extent

during the period from 1942 to 1947 than the shipments from California. This is shown in the following table:

From—	Carlot shipments Mixed vegetables			Carrots		
	1928	1942	1947	1928	1942	1947
Texas	7,837	10,677	11,572	1,684	2,893	4,190
Arizona	405	1,077	2,265	8	2,704	4,826
California	5,772	8,038	13,359	3,628	10,026	12,869
	Potatoes			Onions		
	1928	1942	1947	1928	1942	1947
Texas	3,460	1,358	3,362	7,081	8,909	7,770
Arizona	91	476	1,728		15	497
California	7,380	22,906	41,122	4,310	1,753	4,083
	Cabbage			Tomatoes		
	1928	1942	1947	1928	1942	1947
Texas	7,168	5,815	8,544	4,435	7,883	12,632
Arizona	17	191	441		7	
California	811	1,118	1,264	4,475	4,866	6,690

Onions from Texas declined from 8,909 cars to 7,770 cars, a loss of 1,139 cars, while shipments from California increased from 1,753 cars to 4,083, a gain of 2,330 cars. The increase in potato shipments from Texas was 2,004 cars, while shipments from California increased 18,156 cars. Shipments of vegetables from the lower Rio Grande Valley were 31,938 carloads in the 1943-44 season and 33,743 carloads in the 1947-48 season. The indicated increase was much less than for the country as a whole.

As hereinafter shown, most of the so-called unloadings of vegetables occur at large centers of population. The total shipments to Chicago, Pittsburgh, Detroit, Mich., Baltimore, Md., Boston, Mass., and New York in 1948 were 15,185, as compared with 9,167 in 1941, an increase of 6,018 cars, or 65.6 percent. From the transcontinental origins the shipments were 45,256 and 31,165. The increase was 14,091 cars, or 45.2 percent.

Prices.—Wholesale prices of Texas vegetables at New York and Chicago in months when there is a corresponding movement from one or more of the three other States are generally somewhat lower than those of the California and Arizona products. Carrots in 1947, for example, [fol. 8e] ranged from 57 cents to \$3.54 per crate less and averaged about 25 percent lower than the California and Arizona sales prices.

In Southeastern Vegetable Case, 200 I. C. C. 273, we approved lower levels of rates on the less valuable southeastern vegetables than on the higher valued Florida products. On cabbage, minimum 24,000 pounds, for example, column 32.5 was approved, compared with column 35 from Florida.

Rates assailed.—In Southeastern Vegetable Case, 200 I. C. C. 355, 209 I. C. C. 606, and 214 I. C. C. 63, varying percentages of first class, designated as column ratings, were prescribed within and from the Southwest to the destination territory embraced in the southwestern class rate revision on different kinds of fresh and green vegetables, other than potatoes, and cantaloups, subject to several specified minimum weights. Rates from the Rio Grande Valley and other southern Texas districts were made by adding arbitraries, varying according to column ratings, over the rates from Corpus Christi. These arbitraries resulted in percentage bases from Harlingen, for example, which varied slightly from the prescribed percentage bases. Those bases were, and in substance still are, applicable to the first-class rates prescribed in the original report in the southwestern class rate revision, instead of the class rates generally applicable within and from the Southwest. The prescribed column ratings referred to above do not relate to the latter rates. They included column 30 on cabbage; column 35 on onions, without tops, and beets, carrots, turnips, and rutabagas, without tops or clipped tops, and column 40 on green corn, cucumbers, and eggplant, all subject to minimum of 24,000 pounds, column 42.5 percent on tomatoes and peppers, minimum 20,000 pounds, and spinach, minimum 17,500 pounds, and column 45 on lettuce, minimum 16,000 pounds, and escarole and romaine, minimum 17,500 pounds.

The general increase effective March 28, 1938, on vegetables from the Southwest was 5 percent whereas in the first-class rates it was 10 percent. When those increases were incorporated into the rate tariffs, the column ratings on vegetables were reduced by 5 percent (for example, column 40 became column 38). The reduced rating applied to the increased class rate resulted in an increase of approximately 5 percent as authorized. Thereafter, the relations of the vegetable rates to the first-class rates were fur-

ther disrupted as the result of applying subsequent general increases which, as to fresh vegetables, were generally limited to maximum amounts.

Present single-factor rates on vegetables, in carloads, from Texas, northerly and easterly to southwestern, western trunk-line, official, and southern territories range from [fol. 8f] column 20 to column 43, subject to minima ranging from 16,000 pounds on lettuce to 30,000 pounds on carrots, without tops, in bulk or bags. Except in the Southwest the ratings are generally column 33.5 or higher. Column 20 rates, minimum 24,000 pounds, apply on sweet potatoes to points in the Southwest, and are used as factors in combination rates to other destinations. Subject to a minimum of 17,500 pounds, column 40.5 applies on spinach, and column 43 on parsley, and other light leafy vegetables. Most other vegetables are subject to minima of 20,000 or 24,000 pounds. Thus, except as to those portions of the adjustment which have been modified, as indicated, because of competition of motortrucks, as described in the next paragraph, the foregoing present rates reflect the maximum bases prescribed in 1934.

Because of truck competition, defendants established, effective late in 1940, from Corpus Christi and the Rio Grande Valley areas to the Southwest and to a portion of western trunk-line territory, including certain Mississippi and Missouri River crossings, a single basis of rates on all vegetables, minimum 18,000 pounds, which then approximated 14 cents a car-mile, with 84 percent of that basis for a minimum of 24,000 pounds. These truck-competitive rates to the Mississippi River crossings and numerous other points, used as factors in combination with the local rates beyond, result in combination rates on numerous vegetables which are lower than those prescribed in Southwestern Vegetable Case, *supra*. The base rates to meet truck competition were established from Corpus Christi with an arbitrary of 4 cents added to apply from the southern Texas districts. The extent to which these combinations cut the through rates varies considerably, but their effect is noticeable as to certain vegetables, particularly to points in southern territory, a substantial portion of western trunk-line territory, and to a more limited extent to official territory. Typical

rates on the more important Texas vegetables to those territories are shown in appendix A hereto. Those combination rates of the character just described are shown in italics. As will be observed, such combinations from southern Texas do not cut the through rates on carrots, cabbage, and potatoes to official territory east of Chicago and other group D destinations, but they are applicable on traffic to Illinois, southern territory, and western trunk-line destinations. Generally, the showing in appendix A as to the application of the combinations on tomatoes from the Rio Grand Valley section is typical of many of the other vegetables moving from the valley at rates higher than on cabbage, onions, and potatoes.

[fol. 8g] East Texas produces principally tomatoes and the panhandle and North Texas areas produce mostly onions, carrots, and potatoes. From these districts there are no combinations which make less than the through rates.

Rates sought.—In lieu of the numerous alternate combination and joint through rates on various levels on the several individual commodities to the numerous destinations herein, complainant seeks three distance scales applicable on all vegetables which would alternate and be subject to minima of 20,000 pounds, 24,000 pounds, and 28,000 pounds. These scales are based on the scale of first-class rates in appendix 10 of our report in the general class-rate investigation, 262 I. C. C. 447. Rates are proposed to all destinations, except to points in the Southwest to which motor-competitive rates were established on December 2, 1940, and as to which no evidence bearing on the issue of reasonableness was submitted. A 15-percent differential is proposed for the distance in the so-called mountain-Pacific territory, west of the eastern boundary of Montana, Wyoming, and New Mexico and west of the eastern one-third of Colorado. In several proceedings, we have prescribed a higher level of rates for application in the latter territory than for the territory east thereof.

Complainant suggests rates based on the proposed scales of application from individual origins in Texas, except points in Texas groups 1, 3, and 4, which would take group rates based on average distance from the groups. Repre-

sentative proposed rates, which, for the respective minima, are 33.5, 36, and 40 percent, respectively, of the first-class rates, appear in the table below:

Distance	Minimum 28,000 pounds		Minimum 24,000 pounds		Minimum 20,000 pounds	
	Rates Cents	Differ- ential Cents	Rates Cents	Differ- ential Cents	Rates Cents	Differ- ential Cents
50 miles	28	4	30	5	34	5
100 miles	31	5	35	3	38	6
200 miles	42	6	44	7	49	7
300 miles	52	8	55	8	61	9
500 miles	65	10	70	11	77	12
700 miles	79	12	84	13	94	14
900 miles	92	14	100	15	110	17
1,200 miles	112	17	119	18	129	19
1,500 miles	126	19	133	20	144	22
1,800 miles	138	21	146	22	158	24
2,200 miles	151	23	160	24	174	26
2,700 miles	163	24	173	26	189	28
3,200 miles	175	26	186	28	203	30

¹ Burlington Shippers' Association proposes 81 cents, minimum 18,000 pounds, and 68 cents, minimum 24,000 pounds.

² Burlington shippers propose \$1.03, minimum 18,000 pounds, and 90 cents, minimum 24,000 pounds.

³ Burlington shippers propose \$1.35, minimum 18,000 pounds, and \$1.13, minimum 24,000 pounds.

⁴ Burlington shippers propose \$1.61, minimum 18,000 pounds, and \$1.36, minimum 24,000 pounds. The same shippers propose column 26, minimum 24,000 pounds, on potatoes and column 28.5, minimum 24,000 pounds, on cabbage, to alternate with the proposed scales on all vegetables, referred to in connection with the preceding table.

[fol. 8h] Typical rates on the bases sought for some of the principal vegetables are compared with the present rates and those from representative competing origins in appendix A. As there shown, present rates from Texas origins are generally higher than those from the other producing points for distances comparable to or greater than those from Texas. For example, the rate on carrots from Harlingen to Boston, 2,230 miles is 180.5 cents or 15.5 cents higher than from Phoenix to Pittsburgh, 2,216 miles, and 5.5 cents higher than from Salinas to group B, an average of 2,751 miles.

Cabbage.—Cabbage is one of the leading Texas vegetables. It moves in great volume from that State, and its value is comparatively low, considerably lower than values of cabbage from Florida and other southeastern States. Claim payments are much less than on other vegetables.

See *Southwestern Vegetable Case, supra*, pages 370 to 372. Prices a ton for winter cabbage in 1948 were \$64.40 for Arizona, \$37 for California, \$22.70 for Texas, and \$52.50 for Florida. In 1948, the rail carlot unloadings at Chicago were 148 from Arizona, 52 from California, 842 from Texas, 139 from Florida, 121 from Louisiana, and 170 from Mississippi. In April 1948, some of the unloadings at Chicago originated in each of the States named. From the entire country, the carlot unloadings at Chicago were 1,685 by rail and 1,405 by truck, as compared with 1,745 and 1,227, respectively, in 1947.

Texas cabbage is rated column 28.5, minimum 24,000 pounds. The average load is 25,309 pounds. The minimum on cabbage from Arizona and California also is 24,000 pounds, but since April 24, 1922, the cabbage therefrom has taken the same rates as beets, carrots (from California, except Imperial Valley), onions, parsnips, potatoes, sweet potatoes, and turnips, all of which are subject to a minimum of 30,000 pounds. Certain rates on cabbage from Florida origins to specified eastern cities are less than they would be under the scales proposed by complainant herein.

Carrots.—Shipments of carrots from California and Arizona increased from 54.5 percent of total United States shipments in 1929 to 70.8 percent in 1947. Shipments from New Mexico in 1947 were 1,047 carloads or 4.2 percent of the United States total. Thus, shipments from those three States rose to 75 percent of the total while the Texas proportion of total shipments declined from 23.7 percent in 1929 to 16.8 percent in 1947. During that 18-year period the carlot shipments for the country increased 108 percent, but those from Texas increased only 43 percent.

[fol. 8i] In 1948, the carlot shipments included 1,128 from New Mexico, 3,589 from Arizona, 13,009 from California, and 4,718 from Texas. California ships substantial quantities during each month of the year. The Texas shipping season generally extends from December through July. In New Mexico the season is from August to December. Arizona ships from October through July. The large bulk moves to common markets east of Denver.

Average wholesale prices of carrots in 1947, packed 6 dozen bunches per Los Angeles crate, shown for the 5

months when shipments were received from each of the States named; were as follows: At New York, Arizona, \$5.92; California, \$5.98; Texas, \$4.32. At Chicago the corresponding average prices were \$4.79, \$4.79, and \$4.08. Prices a bushel of winter carrots in 1948 were \$3.65 for Arizona, \$3.60 for California, 95 cents for Texas, and \$3 for Florida.

Carrots, with tops, from Texas are rated column 33, minimum 20,000 pounds, also column 33.5, minimum 24,000 pounds. On carrots, without tops, the ratings are column 33.5, minimum 24,000 pounds, and column 30, minimum 30,000 pounds. The later rating is applicable only within the Southwest and from that territory to southern and western trunk-line territories. The proposed minimum on carrots, with tops, is 28,000 pounds, and the average loading at the estimated weight of 80 pounds, is about 28,800 pounds. On shipments from California and New Mexico, the minimum is 30,000 pounds. Typical rates and the earnings thereunder are shown in appendix A.

In Transcontinental Rates, Estimated Weights, Vegetables, 270 I. C. C. 665, an investigation on our own motion of the estimated weights and packing requirements for carrots and certain other vegetables and rates thereon from western transcontinental origins and Texas to territory generally east of the Rocky Mountains, we concluded, as to carrots, that the record therein afforded no basis for a finding that rates from Texas to eastern destinations were unreasonable or otherwise unlawful if applied to weights actually transported, and required the estimated weight thereon to be increased from 68 to 80 pounds per crate. As our report shows, the evidence therein related primarily to packing requirements and the question of weights. The evidence in this record with respect to the rates on carrots, as well as other vegetables generally, is comprehensive and shows, as to carrots, that the combination rates made by use of the present truck-competitive rates established from Texas, on traffic to all destinations in official territory east of Illinois, except to a few points near the southern boundary of that territory, are not less than the through rates to those destinations herein assailed.

[fol. 8j] The rates on carrots from El Centro and Phoenix to Minneapolis are 5 cents less than rates from Harlingen for a shorter haul. From Grants to destinations in official and western trunk-line territories there are numerous rates, examples of which are in appendix A, lower than rates from Harlingen. The average rate from Harlingen to 13 representative points in group A is \$1.73 for an average distance of 2,005 miles, compared with \$1.55 from Grants for an average distance of 2,200 miles to that group. Defendants instance competition of locally grown vegetables in justification of the rate level from Grants. The record will not support a conclusion that such competition is more forceful than the admittedly intense competition which Texas carrots encounter from California.

The level of the rates on carrots, including increases authorized in Ex Parte No. 168, to representative destinations from Harlingen as compared with those from Phoenix and Salinas, is indicated in appendix B in terms of a common rate scale. The scale used is the first-class scale shown in appendix 10 to the report in *Class Rate Investigation, 1939*, 262 I. C. C. 447, extended beyond 2,500 miles and adjusted to reflect authorized general increases as explained in appendix B hereof. The relatively low rate of progression for the longer distances, which is accentuated by the extension, and the failure to provide any differential for distances in mountain-Pacific territory should be noted. Based on the scale as thus constructed, the level of the Texas rates is indicated as about 15 to 25 percent higher than from Salinas and also substantially higher than from Phoenix. The indicated level of the Phoenix rates to official territory east of Illinois, which reflects the relationship prescribed by the Commission, is less than 5 percent higher than from Salinas, whereas the level from Harlingen is, on the average, about 20 percent higher than from Salinas.

Carrots, cabbage, and onions, without tops, are in the group of heavy-loading or so-called winter vegetables. From Texas to official territory east of Illinois, the rates on carrots are higher than those on cabbage and onions. To New York, for example, the rate of \$1.725 is 21 cents and 11.5 cents higher respectively, than the rates on cabbage and onions. As illustrated in appendix A, rates on all these

vegetables from California, minimum 30,000 pounds (except on cabbage 24,000 pounds) to most transcontinental destinations, particularly those in official territory, are generally the same. From Arizona and some points in California to those destinations, the rates on carrots are 10 cents less than on cabbage and onions. From Harlingen to groups D and E the rates on these vegetables also are substantially the same, and from Grants the rates on carrots are 6 cents lower than those on cabbage and onions. [fol. 8k] While the rates from Texas are subject to a minimum of 24,000 pounds, complainants seek a minimum of 28,000 pounds, which is less than the average loading of Texas carrots computed at the estimated weight of 80 pounds.

Lettuce.—In 1947, some 76,941 carloads of lettuce and romaine were shipped in the United States, of which 73 carloads originated in Texas, 90 in New Mexico, 18,806 in Arizona, and 53,895 in California. The Texas season generally extends from October to March. Shipments were about 15 carloads in the 1946-47 season and 232 carloads in 1947-48. About three times those quantities moved by truck, and lesser quantities by express and in mixed carloads. In 1948-49, about 919 carloads were shipped from the valley and Uvalde, Tex., and 304 carloads from the panhandle section, with 2.5 times that quantity moving by truck. See Estimated Weights on Lettuce from the Southwest, 276 I. C. C. 647, decided December 29, 1949, wherein we approved an increase in the estimated weight on Texas lettuce from 55 pounds to 78 pounds a package, or an increase of 42 percent. The estimated weight on lettuce from New Mexico, Arizona, and California is also 78 pounds a package. Prices a crate in 1948 for winter lettuce were \$3.95 for Arizona, \$3.20 for California, \$3.55 for Texas, and \$2.50 for Florida.

Lettuce from Texas is rated column 43, minimum 16,000 pounds, prescribed in Southwestern Vegetable Case, supra, as compared with the same rating, minimum 17,500 pounds, on romaine. However, a minimum of 20,000 pounds applies on one factor of the combination rate from Texas to Chicago, and 18,000 pounds to points east of Illinois. When the column 43 basis was prescribed, lettuce was not pro-

duced to any extent in the Southwest. Planting of varieties better adapted to the Texas climate has in recent years resulted in a substantial increase in production. The average billing weight on 11 carloads of lettuce from Texas in March 1948, when the 55-pound estimated weight was in effect, was 18,600 pounds. At the present estimated weight it would be 26,364 pounds. The carload minimum from Arizona and California origins is 20,000 pounds. The proposed minimum from Texas is 20,000 pounds.

From Harlingen to New York, 2,003 miles, the present combination rate of \$1.96, minima 18,000 pounds to Cairo, Ill., and 16,000 pounds beyond, yielding 19.6 mills a ton-mile, and the proposed rate of \$1.68, yielding 16.8 mills, are compared with rates of \$1.76 from Salinas to group E, average 2,144 miles, yielding 16.4 mills, and \$1.61 from Grants to group A, average 2,200 miles, yielding 14.6 mills. The assailed rate of \$1.96 is 21 cents less than the rates of \$2.17 from Salinas to group A, 3,214 miles, 11 cents less [fol. 81] than the rate of \$2.07 from Yuma to New York, 2,836 miles.

From Harlingen to Indianapolis, 1,307 miles, the combination rate is \$1.52, as compared with rates of \$1.46 from Sanford, Fla., to Boston, Mass., 1,320 miles, and \$1.45 from Sanford to Buffalo, N. Y., 1,297 miles.

On shipments from southern Texas to Iowa and northwestern Illinois, for example, rates from Corpus Christi are used as bases, to which are added two sets of arbitraries in determining rates from the more distant groups in Texas. On vegetables rated column 43, including lettuce, these arbitraries are 4.25 and 8.5 cents, respectively. Where commodity rates are applicable, however, an arbitrary of 4 cents applies from the lower Rio Grande Valley. Truck-competitive rates apply to Pittsburg, Kans., Kansas City, St. Louis, and St. Joseph, Mo., Omaha, Nebr., Sioux City, Iowa, and Quincy Ill. These rates, plus local factors outbound, generally make lower than the one-factor rates from the valley. From Harlingen to Des Moines, Iowa, 1,210 miles, for example, the combination rate is \$1.35, as compared with the joint one-factor rate of \$1.655. The rate proposed by complainant is \$1.31, whereas that proposed by intervening shippers in Iowa and northwestern Illinois

is \$1.18, minimum 18,000 pounds, or \$1, minimum 24,000 pounds. Compared rates are \$1.24 and \$1.16 from Grants to groups D and E, average 1,365 and 1,345 miles, respectively.

Onions.—Onions, without tops, are one of the principal Texas crops. They are of the Bermuda variety and have an average loading of 26,100 pounds. The carlot unloadings in 1947 at Pittsburgh were 288 from Texas, 25 from Arizona, 83 from California, and 10 from New Mexico. At 100 principal cities, they were 6,700 from Texas, 454 from Arizona, 3,210 from California, and 225 from New Mexico.

Texas onions, without tops, are rated column 33.5, minimum 24,000 pounds. On shipments from California and New Mexico, the minimum is 30,000 pounds. Typical rates and earnings on this commodity are shown in appendix A.

Potatoes, other than sweet.—The predominant position of California in production and marketing of early potatoes is shown in the carlot unloading figures for the principal eastern markets. For example, in 1948, rail shipments to Atlanta were 125 compared with 8 from Texas, 2 from Arizona, and 59 from Florida. At Chicago, in 1947, they were 2,224 from California, 403 from Texas, 321 from Arizona, and 6 from New Mexico. The movement of Texas potatoes is from April to August and coincides roughly with the movement from Arizona and California. As the foregoing table shows, production of potatoes in Texas did not increase from 1928 to 1947, but there were large increases in shipments numerically and percentagewise during that period from Arizona and California.

Texas potatoes are rated column 26, minimum 24,000 pounds. The average loading of 13 carloads in March 1948 was 35,000 pounds. The proposed minimum is 28,000 pounds. The transcontinental minimum is 36,000 pounds from October 1 to April 30, and 30,000 pounds for the rest of the year. As shown in appendix A, the rates from Harlingen to Chicago and Des Moines are on a level comparable with those from Grants, but substantially higher than from California origins.

From Harlingen to Indianapolis, 1,307 miles, the rate is \$1.24, as compared with rates of \$1.02 from Hastings, Fla., to Boston, 1,248 miles, and to Buffalo, 1,225 miles.

Spinach.—In *Southwestern Vegetable Case*, supra, we found that Texas spinach can be loaded in excess of 18,000 pounds and a minimum of 17,000 pounds was approved. Carlot shipments in 1947 included 25 from California, 3,034 from Texas, and 933 from all other States.

On traffic moving from Texas northerly and easterly, spinach is rated column 40.5, minimum 17,500 pounds. The proposed minimum is 20,000 pounds, which now applies from California. The average loading is 17,300 pounds.

From Harlingen to Philadelphia, Pa., 1,920 miles, the combination rate of \$1.97, minimum 18,000 pounds, to Cairo and 17,500 pounds beyond, yielding 20.5 mills a ton-mile, the one-factor rate of \$1.995, yielding 20.8 mills, and the proposed rate of \$1.64, yielding 17 mills, are compared with rates of \$1.76 from Salinas to group E, 2,144 miles, yielding 16.4 mills, and \$2.17 from Salinas to group A, 3,214 miles, yielding 13.5 mills.

Tomatoes.—Tomatoes are one of the principal vegetables shipped from Texas. In 1947, the carlot unloadings at Minneapolis, Minn., included 120 from Texas and 104 from California. To 100 principal cities, they included 10,432 from Texas, 7 from Arizona, 2 from New Mexico, and 5,382 from California. Farm prices, per bushel, in 1948, for early spring tomatoes were \$5.50 for California, \$2.40 for Texas, and \$5.50 for Florida. The heaviest production in California is the early fall crop, which averaged \$3.73 per bushel.

Texas tomatoes generally are rated column 40.5, minimum 20,000 pounds, prescribed in *Southwestern Vegetable Case*, supra. However, column 34.5, minimum 20,000 pounds, and column 30.5, minimum 23,500 pounds, apply on tomatoes, in lug boxes, between points in the Southwest, [fol. 8n] and these rates are used in making combination rates on interterritorial traffic, north and east-bound. The average loading is 24,800 pounds. The transcontinental minimum is 20,000 pounds.

From Harlingen to Minneapolis, 1,471 miles, the through joint rate is \$1.735. The combination rate of \$1.44, with minima of 23,500 pounds to Pittsburg, Kans., and 20,000 pounds beyond, yielding 19.5 mills a ton-mile, and the proposed rate of \$1.43, yielding 19.4 mills, are compared.

with a rate of \$1.76, yielding 16.4 mills, from Salinas to group E, 2,144 miles.

From Harlingen to Indianapolis, 1,307 miles, the rate is \$1.42 as compared with rates of \$1.54 from Fort Pierce, Fla., to Boston, 1,434 miles, and \$1.53 from Fort Pierce to Buffalo, 1,411 miles.

Other vegetables—The carlot rail movement in 1947, including some by boat, of the less important vegetables grown in Texas, shows the relative volume of shipments from that State and other areas indicated:

Commodity	Arizona	California	Texas	Other States
Beans (green and lima)		175	26	4,533
Beets	10	2	524	384
Broccoli	240	1,437	116	33
Cauliflower	719	1,977	29	1,577
Cucumbers	57	57	284	3,273
Eggplant	2	7	6	69
Green corn		176	1,518	1,239
Green peas		2,079	26	1,143
Peppers		165	553	983
Sweet potatoes		386	636	10,257
Turnips and rutabagas	8	3	42	387

On shipments northerly and easterly from Texas, representative ratings are as follows: Romaine and escarole, column 43, minimum 17,500 pounds; green peas, lima beans, and string beans, column 43, minimum 20,000 pounds; peppers, column 40.5, minimum 20,000 pounds; eggplant, cucumbers, and corn in the husk, column 38, minimum 24,000 pounds; sweet potatoes, column 26, minimum 24,000 pounds; beets, turnips, and rutabagas, with tops, column 38, minimum 20,000 pounds or column 33.5, minimum 24,000 pounds; and cantaloups, column 33.5, minimum 20,000 pounds. Within the Southwest and thence to western trunk-line and southern territories, beets without tops and corn in the husk are rated column 30, with minima of 27,000 pounds on corn and 28,000 or 30,000 pounds on beets as packed. Within a restricted territory, cucumbers are rated column 38, minimum 20,000 pounds. Within the Southwest, sweet potatoes have alternate ratings of column 26, minimum 17,500 pounds, and column 20, minimum 24,000 pounds.

[fol. 80] In March 1948, the average loadings were as follows: Beets, 25,382 pounds; broccoli, 24,182 pounds; peas,

23,760 pounds; turnips, 23,100 pounds; and mixed vegetables, 24,300 pounds.

In 1947, average prices a bushel, except as noted, included the following: Early green beans, California \$2.70, Texas \$2.20; second early cantaloups and similar melons, a crate, California \$3.50, Texas \$3.65; early cucumbers, California \$2, Texas \$2.35; early green peas, California \$2.75, Texas \$1.65; and early spinach, California 65 cents, Texas \$1.15. California and Texas have seasonal competition on green beans, cantaloups, cauliflower, green peas, spinach, and sweet potatoes.

From Harlingen to New York, 2,003 miles, the present and the proposed rates, and the ton-mile revenues, are compared with rates and revenues from Salinas to group A, 3,214 miles as follows:

Commodity	Harlingen, Tex.				Salinas, Calif.	
	Present		Proposed		Rate	Ton-mile revenue
	Rate Cents	Ton-mile revenue Mills	Rate Cents	Ton-mile revenue Mills		
Broccoli	183	18.3	154	15.4	217	13.5
Cucumbers	184	18.4	154	15.4	217	13.5
Green corn	188	18.8	154	15.4	217	13.5
Peas	200	20	168	16.8	217	13.5
Peppers	200	20	168	16.8	217	13.5
Parsley	200	20	168	16.8	217	13.5
Cauliflower	191	19	168	16.8	217	13.5
Radishes with tops	188	18.8	154	15.4	217	13.5

¹ Defendants indicate a rate of 188 cents, minimum 24,000 pounds to Cairo and 20,000 pounds beyond.

On cantaloups from Harlingen to New York, the applicable one-factor rate of \$1.83, yielding 18.3 mills, and the proposed rate of \$1.54, yielding 15.4 mills, are compared with a rate of \$2.07 from Phoenix to group A, 2,657 miles, yielding 15.6 mills. The \$2 rate from Harlingen on peppers and parsley is subject to a minimum of 18,000 pounds. The average loading of parsley is 16,500 pounds.

To New York, the Harlingen rate on sweet potatoes is 47 cents below the transcontinental rate, as compared with a spread of 43 cents on July 14, 1928. Compared with corresponding spreads on September 30, 1935, present spreads below the transcontinental rates have increased as follows: Green beans from 5 to 17 cents, cucumbers from 24 to 33

cents, and onions with tops from 5 to 17 cents. Present rates from Harlingen to New York yield the following car-mile revenues: Green corn, 24,000 pounds, 22.5 cents; green beans, 20,000 pounds, 20 cents; broccoli, 24,182 pounds, 22.1 cents; beets with tops, 25,400 pounds, 21.9 cents, and vegetable [fol. 8p] tables, not otherwise specified, 20,000 pounds, 20 cents.

From San Benito, Tex., to Yankton, S. Dak., 1,341 miles, the combination rate on fresh vegetables, based on Pittsburg; Kans., is \$1.37, yielding 25.5 cents a car-mile, as compared with \$1.10 to Sioux City, Iowa, 1,279 miles, yielding 21.5 cents a car-mile.

On onions with tops from Corpus Christi to Ottumwa, Iowa, 1,094 miles, the column 40.5 rate is \$1.50, the combination commodity rate is \$1.31 based on Kansas City, Mo., and the one-factor commodity rate is \$1.18, which is 122 percent of the rate to Kansas City. The distance is 123 percent of that to Kansas City. To Burlington, Iowa, 1,111 miles, the column 40.5 rate is \$1.51; the combination commodity rate based on St. Louis is \$1.29; and the rate proposed by the Iowa and northwestern Illinois shippers is \$1.21. The \$1.29 rate is 119 percent of the St. Louis rate, and the distance is 111 percent of that to St. Louis. To Iowa City, Iowa, the rate is 130 percent of the St. Louis rate, and the distance 118 percent of the St. Louis distance. These comparisons show the varying degree to which the truck-competitive factors affect the adjustment. No issue under section 3 with respect to destination relationships is presented by the complaint.

Vegetables, in mixed carloads.—In 1947, nearly one-fourth of all the carloads of vegetables shipped from Texas consisted of mixed vegetables. In that year, 806 carloads of mixed vegetables from Texas were unloaded at New York, 693 carloads at Chicago, 440 at St. Louis, 388 at Detroit, and 344 at Kansas City. At 100 principal cities, 8,012 carloads were unloaded. Also in that year, of 15,639 carloads of mixed vegetables from Arizona, California, and New Mexico, 7,603 were unloaded at 88 principal cities, including, 1,066 at New York, 314 at Philadelphia, 311 at Pittsburgh, 322 at Detroit, 807 at Chicago, and 385 at Miami, Fla.

Of the 7,603 carloads, 62.9 percent were unloaded at cities in transcontinental groups A to D, inclusive.

Under complex mixed-carload rules in exceptions to the western classification, carload rates from Texas are available on a mixture of vegetables and fruit. Generally, the highest rate on any article in the shipment and the highest minimum weight on any article are applicable, unless lower charges result from using the rate applicable to each commodity, with various provisions when the combined weight of articles taking the same minimum weight is less than such minimum. The average load on mixed vegetables is 24,300 pounds. The minima are 16,000 pounds on lettuce, 17,500 pounds on some 16 articles, 20,000 pounds on 24 articles, 24,000 pounds on 24 articles, and 27,000 to 30,000 pounds on 3 articles. The latter three minima apply only [fol: 8q] on shipments to southern, southwestern, and western, trunk-line territories.

These varying minima, the several different rate bases on various vegetables, and the determination of the lower combinations all contribute to the difficulty which complainants experience in ascertaining the applicable rates on their shipments.

Comparative tonnage data set forth in the table earlier in this report indicate that in 1942, mixed shipments of 8,038 carlots from California were 2,639 fewer than from Texas but that the California shipments rose to 13,359 in 1947, or 1,787 more than from Texas in that year. Similarly, such shipments from Arizona have increased far more rapidly than from Texas. On June 2, 1949, the United Fruit and Vegetable Association, the International Apple Association, and the National League of Wholesale Fresh Fruit and Vegetable Distributors, without knowledge of the proposal in the instant proceeding, advocated a simplified rate basis, with three distance scales and three different minima, for all vegetables, and including fruit, for application over the entire country.

Contrasted with the very complicated rate structure applicable from Texas, from Arizona and California two general rate bases apply on all vegetables, with only a few exceptions. From the latter States to official territory, since April 24, 1922, uniform rates subject to a minimum of 30,000

pounds generally have applied on specified vegetables: namely, beets, carrots, onions, parsnips, onion sets, turnips, and cabbage, except that on cabbage the minimum has been 24,000 pounds. Higher uniform rates, minimum 20,000 pounds, apply on all those named vegetables, also on all vegetables, fresh or green, as described under the heading "Vegetables, fresh or green" in the western classification. The 30,000-pound minimum and rates in connection therewith do not apply to the latter description of vegetables. Lower rates apply on potatoes, minimum 36,000 pounds from October 1 to April 30, and 30,000 pounds for the rest of the year. In conformity with the findings in *California R. Comm. v. Aberdeen & R. R. Co.*, 235 I. C. C. 511, rates on carrots, cauliflower, and lettuce from Imperial, Calif., Phoenix, and Yuma, Ariz., are 10 cents lower than from other origins in California. Thus, with certain exceptions, two general rate bases, with minima of 20,000 pounds and 30,000 pounds, have applied on practically all vegetables from California and Arizona to transcontinental destinations.

Special services.—Perishable freight, including vegetables, is handled in refrigerator cars in trains operated seasonally when the movement takes place. Failure to make schedules, particularly if there is a drop in the market, results in damage claims. The empty-car mileage on one [fol. 8r] line in 1948 was 47.9 percent, as compared with 52.1 percent for the loaded mileage. On 4,447 cars of vegetables handled in March 1948 by 2 southwestern carriers, there were 1,042 diversions or reconsignments. Out of each 100 cars of perishables, including vegetables but excluding meats and packing-house products, handled by another southwestern line in 1947 and 1948, there were approximately 34 diversions, counting 2 or more diversions of the same car by the same carrier, but not counting 2 or more diversions by different carriers. There is no evidence that these services are peculiar to the vegetable traffic from Texas.

Loss and damage claims.—Defendants stress the high claim payments for loss and damage which they assert are much higher than in previous years. On 1,008,172 earloads of fresh fruits, melons, and vegetables handled in the United

States in 1947, the average loss and damage costs were \$19.05 per car. The only data submitted as to vegetables are for the county as a whole. These indicate the average claims in 1947 of \$24.32 per car on carrots and \$12.57 on mixed vegetables were slightly higher, and that \$5.55 on onions was somewhat lower than claims in 1929-31, as shown in Southeastern Vegetable Case, 200 I. C. C. 273, which we found typical also of southwestern vegetables. The average claim payments for spinach of \$17.41 are less than those shown for carrots. The average for cabbage, another important Texas vegetable, is \$8.34, compared with \$4.50 in 1931. All of these groups represent heavy tonnage from Texas. Potatoes with \$3.47 per car are the lowest shown. Tomatoes with \$72.95 per car are the highest, compared with an average of \$36.11 for 1929-31, and \$19.92 for the years 1937-1946. Thus, on at least 75 percent of shipments of Texas vegetables in 1947, the average claims were little higher than in 1929-31. Furthermore, in Transcontinental Rates, Estimated Weights, Vegetables, supra, we prescribed packing requirements and penalty provisions designed to restrict the bulge of packages, which resulted in damage to their contents, and to avoid the expense of recovering as claimed by defendants.

Rate comparisons.—Comparisons of the assailed rates on some of the more important vegetables grown in Texas with those on like traffic from other producing areas have already been shown.

In Package Rates on Citrus Fruits, 251 I. C. C. 691, we prescribed estimated weights and reasonable and nonprejudicial charges on citrus fruit from Florida, Texas, California, and Arizona to destinations in the United States. The following table shows the relationship of the prescribed rates on citrus fruit, also those on selected vegetables, including increases authorized in Ex Parte Nos. 162 and 166, from California and Arizona transcontinental origins to [fol. 8s] those from Harlingen. It will be noted that the prescribed relationship on citrus fruit, in bags, is substantially less favorable to those origins and more favorable to Texas origins than the relationship of the rates on carrots, and to some destinations also on onions and tomatoes.

Percentage transcontinental
rate of Texas rate

To—	Citrus fruit, in bags Percent	Carrots, with tops Percent	Onions Percent	Tomatoes Percent
Baltimore, Md.....	117.4	115	123	113
Boston, Mass.....	117.4	106.3	117	113
New York, N. Y.....	117.4	111	118	115.4
Philadelphia, Pa.....	117.4	113	121	110
Cleveland, Ohio.....	122.4	112	124	125
Detroit, Mich.....	124.1	108	118	120
Pittsburgh, Pa.....	120	110	121	121.5
Indianapolis, Ind.....	134.6	117	115	137

The spread, California over Texas, on carrots to Detroit is 12.5 cents, and on tomatoes to New York 29 cents, compared with spreads on citrus fruit of 27 and 19 cents in packages, and 34 and 26 cents, in bags. To the same eastern cities the relative adjustment, Texas versus California, Arizona, and New Mexico, is also less favorable to Texas on carrots and lettuce than on cabbage and potatoes. The rates on carrots and tomatoes, for example, from Harlingen to New York are higher for a shorter distance than the rates from producing points in California and Arizona, instanced by defendants, to destinations such as Columbus, Ohio, and Peoria, Ill., and which apply to hauls extending for long distances through mountain-Pacific territory. The \$1.725 rate on carrots to New York is 9.5 cents less than the rates from Phoenix and El Centro for distances greater by 642 and 870 miles, and 19.5 cents less than the rate from Salinas, 1,213 miles farther distant.

Comparisons with rates on commodities other than vegetables.—Rates substantially lower than the assailed rates on vegetables, and lower than those proposed by the complainant, apply on such commodities as fertilizer compounds, doorframes, pickles, nonintoxicating beverages, flowerpots, wood preservatives, clay products, stone grinding blocks, carbon briquets, solidified carbon dioxide, charcoal, gypsum lathe, unshelled nuts, citrus pumice, nitrate of soda, hemp bagging, lumber, canned and preserved foodstuffs, lime,²

² Complainant's proposed rates are considerably higher than rates prescribed by us on lime in Lime to and within Southwestern Territories, 194 I. C. C. 559, 205 I. C. C. 282.

petroleum oil, and refined vegetable oils in packages. The [fol. 8t] loading, volume of traffic, value, and other transportation characteristics were not described. On the other hand, rates prescribed by us for application from Texas to interstate destinations, which generally are on higher bases than the assailed rates and move in substantial volume, include denatured alcohol in tank cars; oleomargarine in ventilated cars; chocolate-coated candy bars, cheese, live poultry, peanuts, coffee, bananas, pecans, and eggs.

Competition of producing Areas.—There is severe competition between Arizona and California growers and shippers of fresh vegetables and shippers from Texas, particularly of lettuce, carrots, cauliflower, broccoli, onions, tomatoes, and mixed vegetables. Texas is the strongest competitor of those States in the sale of carrots at the principal markets. The same defendants generally participate in the transportation beyond the Southwest whether shipments originate in Texas or in Arizona, California, and New Mexico. Some defendants serve both Texas origins and points of origin alleged to be preferred. From 1940 to 1947, commercial truck-crop acreage increased 33 percent in Texas, 80 percent in Arizona, and 13 percent in California.

The record contains comprehensive data showing the receipts over a period of recent years of the various kinds of fresh vegetables at 100 principal markets in the United States and 5 in Canada, and the State of origin. These indicate the extent to which the arrival of shipments from Texas at the principal markets coincides with shipments from the alleged preferred origins. For example, there are substantial movements of carrots from Texas, California, and Arizona to the principal markets in the United States during most of the period from December to June, inclusive. Cabbage and broccoli move from these origins during December to April; onions and potatoes from April to July; tomatoes from Texas and California in May to July and in

They are 4 percent higher than certain rates on canned goods and 29 to 44 percent higher than certain rates on hemp bagging, clay products, and other specified commodities, but these are not perishable commodities like vegetables.

November; and some lettuce from Texas during at least 2 months when Arizona and California shipments are heavy.

Texas shipments of carrots to Detroit declined from 13.4 percent of the carlot unloadings at that market in 1941 to 3.6 percent in 1948, compared with a decline from California from 74.3 to 71 percent, and an increase from Arizona from 8.6 to 19.3 percent. Receipts at some other large eastern markets indicate that Texas position in 1948 as compared with 1940 was relatively less favorable than that of Arizona.

At Denver, unloadings of potatoes and onions from California have increased from 1938 to 1948, while the Texas proportion of the total unloadings decreased substantially. At Minneapolis, Minn., Texas unloadings of carrots were [fol. 8u-8v] 8.1 of the United States total in 1947, as compared with 60.8 percent from California and 24.3 percent from Arizona. Of tomatoes, Texas proportion increased from 27.8 percent in 1938 to 31.9 percent in 1947, compared with an increase from California from 17.9 to 27.7 percent. Receipts of onions from California rose from 18 to 54 cars, compared with an increase from 84 to 86 from Texas.

Truck competition.—The establishment of truck-competitive rates within and from the Southwest to certain portions of the destination territory has been mentioned. Rates within the South established to meet truck competition are also used as factors in constructing combination rates to that territory from Texas, lower than the joint rates on the prescribed bases.

There is evidence as to distribution of the receipts of some of the more important vegetables as between rail and truck movement from the United States as a whole at several large cities, but the breakdown by commodities of the total truck receipts is less comprehensive than that for rail receipts. At Chicago the receipts of all fresh vegetables by truck, expressed in rail units, were 21,331 carloads in 1948 and 16,723 carloads in 1947. States originating the bulk of the 1948 truck shipments were Illinois, 6,819; Michigan, 4,704; Florida, 3,085; and Texas, 1,026 carloads, including tomatoes, onions, and carrots, compared with 247 carloads in 1947. This increase from Texas was greater, percentage-wise, than from any of the other States named. Truck receipts at Baltimore in 1948, including a few imports, were

14,908 carlots, of which Arizona originated 6, California 12, and Texas 22. The record shows little or no truck movement from these States in 1948 to any other market in official territory. There is some truck movement from the Southeast and Florida to New York and Baltimore and from most of the southern States to Chicago. A Kansas City firm trucks vegetables in its own trucks to points in Nebraska, Minnesota, Iowa, Illinois, Missouri, and Kansas. The shipments move into Kansas City by rail and truck. Texas vegetables are shipped in jobbers' trucks, merchandisers' trucks, and contract trucks. Vegetables move in substantial quantities by truck from the lower Rio Grande Valley to southwestern, western trunk-line, and southern territories. From three large Texas shippers the percentages of their total shipments moved by truck in the 1948-49 and 1947-48 seasons were 47 and 16.8, 40.1 and 46.3, and 44 and 32, respectively.

Other competition.—As has been shown, many of the rates assailed from Texas on traffic north- and east-bound are on a higher level than those from California, Arizona, and New Mexico. Defendants assert that the transcontinental rates are affected by strong competition, not only from Florida and Texas, but from other districts in the United States by home-grown vegetables. Considering official territory, particularly, the evidence refutes this assertion. As to some of the more important Texas vegetables, to New York the heaviest movement of tomatoes from Texas is in May and June when there are also heavy shipments from Florida but little movement from California. All three areas compete on tomatoes in late fall. The movement of carrots, onions, and broccoli from Florida is, at most, nominal. In late winter and early spring, as to broccoli and carrots, and in the late spring, as to onions, when the movement is heaviest from Texas and California, there is no local production of these commodities, at least in official territory.

The southwestern defendants also contend that the extreme distance that commodities from California must move to reach markets in the East has a marked effect upon the rates which can be charged consistent with any movement. We have recognized the importance of the element of dis-

tance in considering the lawfulness of certain transcontinental rates. But it does not follow that the levels of such rates which move a heavy volume of vegetables are entitled to no weight in the determination of a reasonable adjustment from Texas.

The spreads in rates, Texas under the transcontinental origins on traffic to Detroit and New York, have increased since 1935 as to some vegetables and decreased as to others. To New York there were increases in these spreads of 2.5 cents on cabbage, and 0.5 cent on carrots, and reductions of 6 cents on onions without tops, and of 27 cents on potatoes. On tomatoes defendants show an increase in the spread from 14 to 29 cents. This increased spread, and those on broccoli, radishes, lettuce, and cantaloups are based on rates from Texas which are subject to carload minimum weights substantially higher than those obtaining in 1935. For example, the minimum on broccoli is 24,000 pounds, contrasted with 17,500 pounds in 1935, and 20,000 pounds from California, the principal producing section. As to tomatoes from Texas, the movement to most of official territory is on a rate level higher than from California and one factor of the applicable combinations is subject to a minimum of 23,500 pounds, contrasted with 20,000 pounds from California.

In view of the truck-competitive rates established within and from the Southwest in 1940, defendants claim that the adjustment from Texas to official territory was reduced sharply. As shown in appendix A, such is not the fact as to some of the heavy-loading vegetables. The rates on carrots, cabbage, and potatoes to the territory east of [fol. 8x] Illinois are generally unaffected by the combinations which employ those truck-competitive rates. On broccoli the joint rates, based on column 36, minimum 20,000 pounds, to that territory are somewhat lower than the combinations to group A and slightly higher to points west of group A. On the vegetables rated higher than column 36, of which the rates on tomatoes are representative, the combinations are generally less than the one-factor rates by amounts of 2.5 cents at New York to 10.5 cents at Fort Wayne. On the highest-rated group, including lettuce for example, the combinations are generally less by amounts of 16.5 cents at New York to 21.5 cents at Fort Wayne. The

combination rate on lettuce from Harlingen to New York, 2,003 miles, is \$1.96, subject to minima of 18,000 and 16,000 pounds. Under the basis herein prescribed, it would be \$1.725, minimum 20,000 pounds, compared with rates of \$1.61 from Grants to group A, an average distance of 2,200 miles, and \$1.76 from Salinas to group D, an average distance of 2,335 miles.

West-bound rates from Texas.—The west-bound rates from Texas to points in California and Arizona are substantially higher than the rates east-bound from those points to Texas. Complainants contend that such west-bound rates are unduly prejudicial to Texas shippers and unduly preferential of the east-bound shippers to the extent that the rates west-bound exceed those east-bound between the same points. Typical differences in these rates are shown in the table below:

Rates between Harlingen, Tex., and—

	Salinas, Calif.			Phoenix, Ariz.		
	West-bound Cents	East-bound Cents	Difference Cents	West-bound Cents	East-bound Cents	Difference Cents
Cabbage.....	¹ 168	² 149	19	149	149	...
Carrots.....	² 168	³ 149	19	¹ 168	³ 139	29
Onions ³	152	129	23	152	129	23
Potatoes ⁴	152	103	49	149	97	52
Vegetables ¹	168	163	5	168	158	10

¹ Minimum weight 20,000 pounds.

² Minimum weight 24,000 pounds.

³ Minimum 30,000 pounds.

⁴ Minimum 30,000 pounds, except 36,000 pounds west-bound from Oct. 1 to May 31, inclusive.

Harlingen is in transcontinental group H. As to carrots the \$1.49 rates from Salinas applies not only to groups H and I, which embrace Oklahoma and Texas, but also to groups D, E, and F for substantially greater distances.

In 1947 shipments of vegetables from California to Amarillo, Dallas, Fort Worth, Houston, and San Antonio, Tex., and two destinations in Oklahoma totaled 8,187 carloads; [fol. 8y] many of which contained vegetables grown extensively in Texas.

The carlot unloads of most Texas vegetables at Los Angeles, San Francisco, Portland, and Seattle are relatively light as compared with those from mountain-Pacific States.

Unloads of Texas carrots and cabbage at these cities in 1948 totaled 51 carloads of total rail unloads of 1,258 carloads, and truck receipts of 9,076 carloads. Onions and tomatoes moved in greater volume but declined from 353 and 356 cars, respectively, in 1946 to 157 and 130 cars in 1948. Shipments of tomatoes from California to those markets increased from 291 to 384. Rail carlot unloads of other vegetables at those cities in 1948, included the following: Snap beans, 52 from California and 1 from New Mexico; broccoli, 5 from California; green corn, 10 from Texas, 177 from California, and 91 from Oregon; cucumbers, 9 from Texas, 12 from Florida, and 3 from California; green peas, 51 from California, 24 from Colorado, and 11 from Washington; peppers, 28 from California, 29 from Florida, and 37 from Texas; and sweet potatoes, 153 from California, 223 from Louisiana, and 34 from Texas. Potatoes from Texas unloaded at Los Angeles declined from 28 cars in 1946 to 2 cars in 1948, no Texas carrots were received during the 3-year period, and onions declined from 141 cars to 48 cars, while shipments from Oregon and California increased substantially, greatly exceeding those from Texas.

In 1948 Texas shipped only 20 carloads of tomatoes to Southern Pacific destinations in California, contrasted with 308 carloads in 1945.

Carlot unloads in 1947 and 1948 of cabbage, carrots, lettuce, onions, tomatoes, and mixed vegetables at the principal cities in the States named are shown in the following table:

In—	From—		In—	From—	
	California and Arizona	Texas		California and Arizona	Texas
California:			Texas:		
1947.....	1,118	55	1947.....	5,085	951
1948.....	1,007	167	1948.....	5,355	747
Arizona:			Oklahoma:		
1947.....	672	5	1947.....	1,153	336
1948.....	553	4	1948.....	1,141	340

In Louisiana and Arkansas there was a similar preponderance of unloads from California and Arizona.

There is no showing of transportation conditions which would justify the differences in rates shown. Defendants

attribute the level of the east-bound rates to competition of unregulated truck transportation in the year 1936 or earlier. [fol. 8z] Volume of truck movement in more recent years from California and Arizona to Texas is not shown. At New Orleans and Kansas City during the past decade heavy receipts of the principal vegetables from California and Arizona were almost entirely by rail.

It is apparent that the rates from California and Arizona are on a level which permits producers in those States to market a substantial volume in Texas and the Southwest, but the Texas producers, whose west-bound rates are substantially higher than the corresponding east-bound adjustment, ship only a small proportion of their output to the populous Pacific coast areas and Arizona.

Conclusions

The instant record affords a basis for review, upon comprehensive evidence and in the light of our findings in *Southwestern Vegetable case, supra*, of the adjustment therein prescribed, insofar as it related to traffic from Texas origins. The evidence discloses numerous important changes in conditions pertaining to that traffic, some of which occurred soon after that adjustment became effective, and others more recently. Notable, in this connection, is the rapid growth of truck transportation of certain vegetables, particularly for distances up to 1,500 miles, as evidenced by the substantial and increasing volume of such shipments in recent years from Texas to such points as Chicago, and to a lesser extent as far eastward as Baltimore. The influence of this competition, which bears directly upon the value of the rail service, has been reflected to some extent in the rates to limited areas adjacent to southwestern territory, but, with the exception of rates to Illinois and portions of western trunk line and southern territories, the level of rail rates as to most vegetables from Texas is still substantially higher than the truck-competitive basis maintained from southern Texas to the Southwest and bordering States.

Among other changes are the heavier loadings of both leafy and root vegetables and the increases in estimated weights from Texas. These weights were increased, in the

proceedings cited above, from 68 to 80 pounds for carrots and from 55 to 78 pounds for lettuce. Their effect was to increase the billing weights to about 28,800 pounds for carrots and from 18,600 pounds to 26,364 pounds for lettuce, and the per car and car-mile revenue by 17.7 percent on carrots and 42 percent on lettuce.

It is apparent that there is warrant for increases in the prescribed carload minima of 24,000 pounds and 16,000 pounds, on carrots and lettuce, respectively, to more nearly [fol. 8aa] correspond with those increased weights and the minima applicable from California, Arizona, and New Mexico.

On the other hand, as shown in appendix B, the level of the assailed rates on carrots to most of official territory and to portions of western trunk-line and southern territories is substantially higher than the level of corresponding rates from the western producing points, all in mountain-Pacific territory. The \$1.58 rate, on the basis herein found reasonable, from Harlingen to New York, 2,003 miles, is 3 cents higher than the corresponding rate from Grants, N. Mex., to New York, 2,177 miles. The \$1.58 rate, plus the increase authorized in Ex Parte No. 168, would yield earnings, on the average load of 28,800 pounds, of \$481 per car and 24 cents per car-mile. From Salinas to New York, 3,215 miles, the rate of \$1.92 similarly increased, on the minimum of 30,000 pounds, yields \$603 per car and 18.8 cents per car-mile.

On potatoes, cabbage, and onions, without tops, on which minimum weights of 24,000 pounds or higher generally apply from both Texas and the Western States the rates assailed compare favorably with those sought by complainant. Those to numerous points in western trunk-line and southern territories are about the same as or lower than the rates sought. With some exceptions they are lower than rates on the column 30 basis prescribed in *Southwestern Vegetable* case, *supra*. They are also more fairly related, distance and other transportation characteristics considered, to those from New Mexico, Arizona, and California, particularly on traffic to eastern destinations, than are the rates on carrots and the other vegetables on which we prescribed various ratings higher than column 30 in that

proceeding. Rates reflecting the latter ratings have in many instances become mere paper rates, especially from southern Texas to Illinois, western trunk-line and southern territories because of the lower combination rates, as previously described.

To official territory east of Illinois, notwithstanding that combinations are now effective on most of the lighter loading vegetables rated column 36 or higher, the general levels of those rates range well above the quite uniform level of corresponding rates on these vegetables from the western producing points. Minimum weights from Texas higher than 20,000 pounds on some more important vegetables are also out of line with the minimum of 20,000 pounds applying from those points.

Illustrative of the varying rates on these lighter loading vegetables are the following from Harlingen to New York: \$2 on string beans, parsley, peas, peppers, and spinach; \$1.96 on lettuce; \$1.91 on cauliflower; \$1.88 on corn, radishes with tops, and tomatoes; \$1.84 on cucumbers and \$1.83 on [fol. 8bb] broccoli and cantaloups. The present ratings which determine the interterritorial one-factor rates from the Southwest on these commodities range from column 36 on broccoli to column 43 on cauliflower, parsley, spinach and string beans. These ratings are subject to carload minimum weights of 20,000 pounds except that lower minima apply on lettuce, spinach and parsley, as heretofore described and 24,000 on corn and cucumbers. On all of the vegetables named to transcontinental group A, including New York, the rate from Salinas is \$2.17, minimum 20,000 pounds, and on cantaloups from Phoenix it is \$2.07, same minimum. From Grants to group A defendants maintain a rate of \$1.61 on broccoli, cauliflower and lettuce, minimum 20,000 pounds.

The maximum reasonable basis of column 33.5 herein prescribed on these vegetables from Texas would produce a rate from Harlingen to New York of \$1.70, minimum 20,000 pounds. The minimum revenue per car and per car mile on that basis would be slightly higher than on the column 43 basis, minimum 16,000 pounds, heretofore prescribed on lettuce. The revenue per car, exclusive of the increase under Ex Parte No. 168, at the prescribed rate and present

estimated weight and average loading of lettuce would be \$454.78, compared with \$340 under the column 43 basis, minimum 16,000 pounds. Similar revenue would be yielded by mixed vegetables, which load on the average 24,300 pounds.

The adjustment from Texas is very complicated as compared with that from California and Arizona. The evidence in this record points to the need for and propriety of a more uniform level of rates on the several varieties of vegetables produced in Texas. A common rate level on all vegetables, minimum 18,000 pounds, applies from south Texas to the Southwest and is reflected in the combination rates to much of the territory north and east thereof. From California and Arizona to eastern destinations a uniform basis, subject to a minimum of 20,000 pounds, applies on practically all vegetables. There is an increasing movement of vegetables in mixed carloads and a more uniform rate level would facilitate determination of the applicable charges on such mixed shipments from Texas.

In *California R. Comm. v. Aberdeen & R. R. Co.*, supra, we found the assailed rates on lettuce, melons, other than watermelons, carrots and cauliflower, in carloads, from Arizona and Imperial Valley origins in California, to destinations east of the Rocky Mountains, which prior to September 5, 1936, had been the same as from the California origins to those destinations, unduly prejudicial to Arizona and the Imperial Valley and preferential of the California producing points, to the extent that the rates from the [fol. 8cc] nearer origins were less than 10 cents per 100 pounds lower than from the other California origins. In making that finding we agreed with the conclusion of division 2 in an earlier decision that for the future more recognition should be given to the fact that the Arizona producers were generally 200 to 600 miles closer to the eastern markets than their California competitors and that the large origin rate blanket should be made smaller.

The rates from more distant allegedly preferred points to many destinations are relatively lower than from the Texas origins allegedly prejudiced, when total distances, hauls in interrated territory, and ton-mile revenues are considered, but the intent of the statute is to afford car-

riers some latitude in fixing rates, and distance or cost of service is not the sole criterion of whether the alleged prejudice is undue. The record shows, in considerable detail, the extent to which complainant's products are shipped to common markets contemporaneously with similar vegetables from the alleged preferred origins. However, there is no persuasive evidence as to the specific effect of the assailed adjustment on complainant's members' ability to sell in those markets, such as is necessary to support the requested finding of undue prejudice.

Findings

1. We find that the assailed rates on carrots, with tops, in carloads, from points in Texas to destinations in official, western trunk-line, and southern territories, are and for the future will be unreasonable to the extent that they exceed column 30 rates, minimum 28,000 pounds, based on the same first-class or class 100 rates as the present column ratings, present arbitraries over Corpus Christi, where applicable, to be observed as maxima.
2. We further find that the assailed rates on vegetables, fresh or green (other than cold pack), as described under the heading "Vegetables, fresh or green," in western classification, other than those on cabbage, carrots, with tops, onions, without tops, and potatoes (including sweet potatoes and yams) from Texas origins to destinations in official territory east of Illinois classification territory are and for the future will be unreasonable to the extent that they result in charges which exceed, or may exceed, those which would result from the application of column 33.5 rates, minimum weight 20,000 pounds, based on the first-class or column 100 rates and arbitraries specified in finding 1.
3. We further find that the assailed rates from points in Texas to points in Arizona and California are and for the future will be unreasonable to the extent that they exceed the present rates on like traffic east-bound between the same [fol. 8dd] points subject to the carload minimum weights on such east-bound traffic.
4. We further find that in other respects the assailed rates are not shown to be unreasonable, and that the alle-

gation of undue prejudice and preference has not been sustained:

An appropriate order will be entered.

Aitchison, Commissioner, concurring:

For reasons stated in my dissenting expression in South-eastern Vegetables Case, 200 I. C. C. 273, at pages 301 to 304, I am of the view that so far as the report adopted by the Commission follows the system of relating the rates prescribed to class rates by the device of "columns" or percentages of first class, it proceeds upon principles which are fundamentally unsound. This is particularly so when the class scale basis used is obsolete and has been condemned as in violation of the act, as is the case here. Therefore, the prescription of rates in this proceeding can at best be considered as only temporary, and doubtless a new situation will come up when the existing class rates are further revised. Nevertheless, the record before us does not permit us to utilize what I must consider is a fundamentally sound basis, and I therefore concur, notwithstanding my dissatisfaction with this portion of the adjustment made by the report.

I am authorized to state that Commissioner Knudson joins in this expression.

Cross, Commissioner, concurring in part:

I agree with the majority that certain of the assailed rates are unreasonable, but I do not believe that the record warrants a reduction in these rates to the basis found reasonable in the report. I would prescribe the alternate application of column 36 rates, minimum 20,000 pounds, and column 33.5 rates, minimum 24,000 pounds, on all vegetables; provided that this finding should not be construed as approving any increase in lower column rates presently effective on certain of these vegetables.

Chairman Johnson and Commissioners Lee, Rogers, and Mitchell dissent.

(Here follows 1 Paster, side folio See)

[fol. See]

EXHIBIT 1 TO COMPLAINT
Report and Order of the Commission Dated December 21, 1950

APPENDIX "A" TO EXHIBIT 1

		Carrots				Potatoes				Cabbage				Onions, without tops				Tomatoes				
		Texas (present) 24,000 pounds, ¹ Texas (proposed) 28,000 pounds, other 30,000 pounds				Texas (present) 24,000 pounds, Texas (proposed) 28,000 pounds, other 30,000 pounds				Texas (present) 24,000 pounds, Texas (proposed) 24,000 pounds, other 24,000 pounds				Texas (present) 24,000 pounds, Texas (proposed) 24,000 pounds, other 24,000 pounds				Texas (present) 20,000 pounds, ² Texas (proposed) 20,000 pounds, other 20,000 pounds				
		Rate		Ton-mile revenue		Rate		Ton-mile revenue		Rate		Ton-mile revenue		Rate		Ton-mile revenue		Rate		Ton-mile revenue		
From—	To—	Miles	Present Cents	Proposed Cents	Present Mills	Proposed Mills	Present Cents	Proposed Cents	Present Mills	Proposed Mills	Present Cents	Proposed Cents	Present Mills	Proposed Mills	Present Cents	Proposed Cents	Present Mills	Proposed Mills	Present Cents	Proposed Cents	Present Mills	Proposed Mills
Harlingen, Tex.	Boston, Mass.	2,230	180.5	153	16.2	13.7	153	153	13.7	13.7	158.5	162	14.2	14.5	164	162	192	176	17.2	15.8		
	New York, N. Y.	2,003	172.5	146	17.2	14.6	149	145	14.9	14.5	151.5	154	15.1	15.4	161	154	188	168	18.8	16.8		
	Washington, D. C.	1,774	164.5	137	18.6	15.5	143	137	16.1	15.4	144.5	145	16.3	16.3	156	145	180	157	20.3	17.7		
Salinas, Calif.	Group A	3,214	192		11.9		161		10.0		192		11.9		192		217		13.5			
Phoenix, Ariz.	New York, N. Y.	2,647	182		13.8																	
Grants, N. Mex.	Group A	2,200	155		14.1																	
Harlingen, Tex.	Pittsburgh, Pa.	1,661	158.5	133	19.1	16.0	137	133	16.5	16.0	139.5	141	16.8	17.0	145	141	165	153	19.9	18.4		
Salinas, Calif.	Group B	2,751	175		12.7		145		10.5		175		12.7		175		215		15.6			
Phoenix, Ariz.	Pittsburgh, Pa.	2,216	165		15.0										175	141	17.5	17.0				
Grants, N. Mex.	Group B	1,763	140		15.9										175		215					
Harlingen, Tex.	Detroit, Mich.	1,553	154.5	129	19.9	16.6	132	129	17.0	16.6	136.5	136	17.8	17.8	141	136	18.2	17.8	159	148		
Salinas, Calif.	Group C	2,533	167		13.2		138		10.9		167		13.2		167		206		20.5	19.1		
Grants, N. Mex.	do	1,515	133		17.6										167				16.3			
Harlingen, Tex.	Chicago, Ill.	1,369	124	121	18.1	17.7	124	121	18.1	17.7	122		18.1	18.7	124	128	18.1	18.7	136	138		
Salinas, Calif.	Group D	2,123	149		12.8		125		10.7		149		12.8		133		176		19.9	20.2		
Grants, N. Mex.	do	1,365	118		17.3		124		17.3		124		17.3		124				15.1			
Harlingen, Tex.	Des Moines, Iowa	1,210	119	114	19.7	18.8	114	114	18.8	18.8	119	121	19.7	20.0	119	121	19.7	20.0	135	131		
Salinas, Calif.	Group E	2,144	149		13.9		119		11.1		149		13.9		129		176		22.3	21.6		
Grants, N. Mex.	do	1,345	110		16.1		116		17.3		116		17.2		116				16.4			
Harlingen, Tex.	Columbia, S. C.	1,462	138	123	19.7	17.6	124	123	15.6	17.6	118	130	16.8	18.5	130	130	18.5	18.5	154	141		
Salinas, Calif.	Group K	2,909	192		13.2		164		11.3		192		13.2		192		217		22.0	20.1		
Harlingen, Tex.	Knoxville, Tenn.	1,268	132	117	20.8	18.4	121	117	19.1	18.5	113	123	17.8	19.4	125	123	19.7	19.4	147	133		
Salinas, Calif.	Group L	2,715	175		12.9		154		11.3		175		12.9		175		211		23.2	21.0		

¹ Carload minimum 20,000 pounds.
² Carload minimum 20,000 pounds.

¹ Carload minimum 20,000 pounds in connection with factors beyond border points used in constructing combination rates.
² Carload minimum 23,500 pounds in connection with Southwestern factor used in constructing combination rates.

³ Also applies from El Centro, Calif., 2,875 miles.

NOTE: Combination rates, where applicable, are shown in italics.

[fol. 8ff]

APPENDIX "B" TO EXHIBIT 1

Relation of rates on carrots to first-class rates ¹ in appendix 10 of report in Class Rate Investigation, 1939, 262 I. C. C. 766

To—	From Harlingen, Tex.			From Phoenix, Ariz.			From Salinas, Calif.		
	Distance	Rate	Percent of No. 28300	Distance	Rate	Percent of No. 28300	Distance	Rate	Percent of No. 28300
	<i>Miles</i>			<i>Miles</i>			<i>Miles</i>		
Boston, Mass.....	2,231	\$1.865	30.9	2,755	\$1.88	28.3	3,309	\$1.98	27.2
New York, N. Y.....	2,005	1.785	31.6	2,647	1.88	28.8	3,218	1.98	27.6
Baltimore, Md.....	1,824	1.725	32.3	2,505	1.88	29.6	3,082	1.98	28.1
Buffalo, N. Y.....	1,760	1.705	32.8	2,281	1.77	28.0	2,830	1.81	26.8
Pittsburgh, Pa.....	1,664	1.645	32.5	2,216	1.71	28.6	2,797	1.81	27.0
Detroit, Mich.....	1,560	1.605	33.5	2,050	1.63	28.3	2,599	1.73	26.8
Columbus, Ohio.....	1,477	1.605	34.5	2,025	1.71	28.6	2,797	1.81	27.0
Indianapolis, Ind.....	1,298	1.485	34.7	1,846	1.63	28.2	2,435	1.73	27.5
Average.....	1,727	1.677	32.9	2,291	1.754	28.6	2,883	1.854	27.3
Chicago, Ill.....	1,374	1.30	29.2	1,790	1.45	27.4	2,327	1.55	25.1
St. Louis, Mo.....	1,112	1.01	26.3	1,618	1.45	29.2	2,244	1.55	25.7
St. Paul, Minn.....	1,469	1.50	32.3	1,787	1.45	27.6	2,176	1.55	26.1
Tampa, Fla.....	1,380	1.48	33.3	2,192	1.88	31.5	2,929	1.98	28.7
Atlanta, Ga.....	1,175	1.33	33.2	1,900	1.71	31.2	2,701	1.81	27.5
Birmingham, Ala.....	1,017	1.25	34.0	1,733	1.63	31.6	2,534	1.73	27.0


¹ Rates in the scale were increased by percentages authorized in Ex Parte Nos. 162, 166, and 168 for official territory. Beyond 2,500 miles the basic scale was progressed 7 cents per 100 miles.

[fol. 9]

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 21st day of December A. D. 1950. ,

No. 30074



Texas Citrus and Vegetable Growers and Shippers

v.

Atchison, Topeka & Santa Fe Railway Company et al.

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the defendants named in the complaint, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before April 7, 1951, and thereafter to abstain, from publishing, demanding, or collecting, for the transportation of the commodities specified from and to the points designated in the succeeding paragraphs hereof, rates which exceed those prescribed in said paragraphs.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1951, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation of carrots, with tops, in carloads, from points in Texas to destinations in official, western trunk-line and southern territories, rates which shall not exceed column 80 rates, minimum 28,000 pounds, based on the same first-class or column 100 rates as the present column ratings and present arbitraries over Corpus Christi, Texas, where applicable

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1951, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce [fol. 10] Act, and thereafter to maintain and apply to the transportation of all vegetables, fresh or green (other than cold pack), except on cabbage, carrots, with tops, onions without tops, and potatoes (including sweet potatoes and yams), and as described under the heading "Vegetables, fresh or green" in western classification, in earloads, from all points of origin in Texas to all destinations in official territory east of Illinois classification territory (as described in Class Rate Investigation, 1939, 262 I. C. C. 447, 516), rates which shall not result in charges exceeding those which would result from the application of column 33.5 rates, subject to a minimum of 20,000 pounds, based on the first-class or column 100 rates and arbitraries specified in the second ordering paragraph hereof.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 7, 1951, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation of all vegetables, fresh or green (other than cold pack), in earloads, from all points of origin in Texas to points in California and Arizona, rates which do not exceed the present rates on like traffic east-bound between the same points, subject to the earload minimum weights applicable on such eastbound traffic:

And it is further ordered that this order shall continue in force until the further order of the Commission.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 11]

EXHIBIT 2 TO COMPLAINT

Plaintiffs' Petition Dated March 16, 1951

I. C. C. Docket No. 30,074

Before the

INTERSTATE COMMERCE COMMISSION

TEXAS CITRUS AND VEGETABLE GROWERS AND SHIPPERS

VS.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al.
Petition

Now come defendants operating in Southwestern and Official territories; hereinafter called petitioners, and respectfully request the Commission to reopen this proceeding for further hearing to receive evidence as specified herein, to reconsider its decision on the record as so supplemented, and to postpone until further order of the Commission the effective date of the order herein pending further hearing and reconsideration. In support thereof, these defendants respectfully state:

1. By order, dated December 21, 1950, the Commission prescribed rates for the future as follows:

(a) On carrots, with tops, in carloads, from origins in Texas to destinations in Official, Western Trunk Line and Southern territories, rates which shall not exceed column 30 rates, minimum 28,000 pounds, based on the same first-class or column rates as the present column ratings and present arbitraries over Corpus Christi, Texas, were applicable; and

(b) On all vegetables, fresh or green (other than cold pack) except on cabbage, carrots, with tops, onions without tops, and potatoes (including sweet potatoes and yams), in carloads, from origins in Texas to destinations in Official territory east of Illinois classification territory, rates which shall not result in charges exceeding those which would result from the applica-

tion of column 33.5 rates, minimum 20,000 pounds, based on the first-class or column 100 rates and arbitraries specified in the preceding subparagraph.

The effective date of the order was specified as April 7, 1951, but was subsequently postponed on February 28, 1951, until May 15, 1951, upon not less than 30 days' notice.

2. Appendix A attached hereto contains present and prescribed rates and minimum weights to certain destinations in Official territory. While the order is not clear as to the rates prescribed, petitioners construe the order as requiring rates based on the first-class or column 100 rates [fol. 12] prescribed in the original docket 13535 decision, increased to the June 30, 1946, level, as published in S. W. L. Tariff 152E, Agent Marsh's I. C. C. No. 3144; S. W. L. 154E, Agent Marsh's 3490; S. W. L. 151D, Agent Marsh's 3705; and S. W. L. 153B, Agent Marsh's 3493, with the resulting rates increased by later general increases authorized in Ex Parte 162, 166 and 168. From origins beyond Corpus Christi, petitioners construe the order as requiring rates on a given vegetable computed by adding to the prescribed basic rates on that vegetable from Corpus Christi, the arbitraries presently applicable on that vegetable, and then increasing the resulting basic rates under the postwar general increases.

The report in this proceeding states that the prescribed rates, excluding the Ex Parte 168 general increases, from Harlingen to New York are \$1.58 on carrots with tops, and \$1.70 on vegetables subject to the column 33.5 rating (sheets 40 and 42, mimeographed report).

Those rates increased under Ex Parte 168 would become \$1.67 and \$1.79, respectively. As petitioners construe the order herein, the rates prescribed from Harlingen to New York are \$1.67½ on carrots with tops, and from \$1.81½ to \$1.83½ on the other vegetables. Petitioners are unable to check the basis for the \$1.58 and \$1.70 rates set forth in the decision.

3. If a further hearing is granted, petitioners will submit for the record a revenue study showing the revenue earned at the applicable rates on the vegetables, affected by

the second and third ordering paragraphs of the Commission's order, which moved during the 1949-50 shipping season and the revenue which would have been earned had the prescribed rates been in effect. Petitioners will also submit evidence to show the effect on revenue of the prescribed changes in the minimum weights. Such evidence was not available at the time of the prior hearings in this proceeding and at that time defendants could not have known the prescribed basis for the purpose of preparing such evidence. Appendix B attached hereto shows the results of studies made on traffic affected by the second and third ordering paragraphs of the order which originated in Texas on the Gulf Coast Lines and the St. Louis Southwestern Railway Lines during the 1949-50 shipping season. The prescribed revenue for carloads of mixed vegetables is estimated by reducing the present revenue 1.25 per cent which is one-half of the per cent of reduction in revenue prescribed on straight carloads of all vegetables affected by the order which originated on the Gulf Coast Lines. Petitioners are informed and believe, and therefore aver, that the revenue study petitioners desire to make and submit for the record will show a greater reduction in revenues for carloads of mixed vegetables.

4. If a further hearing is granted, petitioners will offer evidence to show the earnings per car and per car mile on the prescribed rates and minimum weights for the affected [fol. 13] vegetables. Such evidence was not available to these defendants at the time of the prior hearings, since the prescribed basis was not then known. Appendix C attached hereto indicates what such evidence will show. If a further hearing is granted, petitioners will offer evidence to prove such earnings will be unreasonably low for the traffic affected by the order.

5. (a) Petitioners are informed and believe, and therefore aver, that the rates prescribed by the order of December 21, 1950, are less than the costs of providing the service covered by the rates and are confiscatory of the property of petitioners, and of each of them, in contravention of the Fifth Amendment to the Constitution of the United States. Petitioners hereby offer to prove, and if further

hearing is granted, petitioners will introduce evidence to show that the costs to them of providing the service covered by the rates prescribed by said order of December 21, 1950, are substantially in excess of such rates and that said prescribed rates are confiscatory as to individual petitioners and to petitioners as a group.

(b) Petitioners could not properly assume that the Commission would prescribe rates lower than the costs to defendants of rendering the service and, therefore, their omission to introduce cost-of-service evidence at the prior hearings does not foreclose them from offering such evidence of confiscation at a further hearing. The cost evidence petitioners desire to introduce of record was not available to them at the time of the prior hearings and much of it has not yet been prepared for the particular roads and periods such evidence will cover. If, however, the Commission will reopen the case for further hearing and will postpone the effective date of its order pending such further hearing and reconsideration, petitioners will undertake promptly to prepare and present such cost evidence.

(c) As generally indicative of the cost evidence sought to be introduced and of the inadequacy of the prescribed rates to meet the costs to defendants of providing the service contemplated by such rates, there are set forth in Appendix D hereto comparisons (1) of the revenues which would have accrued to petitioners from the movements of carrots, with tops, and from other vegetables, during the 1949-50 shipping season from origins on the Gulf Coast Lines (Guy A. Thompson, Trustee) in the Rio Grande Valley producing section of Texas to destinations in Official territory east of Illinois Classification territory, if such movements had been subject to the basis of rates prescribed in said order of December 21, 1950, with (2) the costs of service for the year 1948, as adjusted to July 1, 1950, and computed by Eastern railroads in substantial conformity with Rail Form A Formula of the Commission's Bureau of Accounts and Cost Finding, for the Class I Railroads of the Southwestern region, plus The Atchison, Topeka & Santa Fe Railway; The Chicago, Rock Island and Pacific Railroad and the Ft. Worth and Denver City Railway, [fol. 14] herein collectively designated the Southwestern.

Group, and for the Class I Railroads of the Eastern District. As will appear from reference thereto, the comparison shows that the revenues from the prescribed rates fail by a substantial margin to equal the freight portion of operating expenses, taxes, and rents without any contribution whatsoever toward a return on the depreciated investment.

(d) Petitioners further aver that the terminal element in the costs as computed under said Rail Form A Formula does not adequately represent the terminal costs incurred in originating fresh vegetables in the Rio Grande Valley or in terminating such traffic in the larger Eastern cities which receive the bulk of the movement. If further hearing is granted, defendants originating traffic in Texas and defendants serving large Eastern cities will respectively present evidence in proof of this averment.

(e) As more indicative of the costs which petitioners ask opportunity to prepare and present, and of the inadequacy of the prescribed rates to meet the costs of providing the service contemplated by such rates, there are set forth in Appendix E hereto comparisons of the revenues which would have accrued from the traffic described in the subparagraph lettered (c) above at the rates herein prescribed, with the costs-of-service computed under the Rail Form A Formula but with substitution (in lieu of the terminal costs under the formula) of costs of originating the traffic in the Rio Grande Valley as ascertained by the origin lines and with substitution of special destination perishable terminal costs as ascertained by delivering carriers at large Eastern cities. As will appear from reference thereto, the comparison shows that the revenues from the prescribed rates fail by a very wide margin to equal costs-of-service.

(f) As also indicative of the inadequacy of the prescribed rate to meet the costs to defendants of providing the service contemplated by such rates, there are set forth in Appendix F hereto comparisons of said revenues with the fully-distributed costs and out-of-pocket costs for the roads of the Southwestern Group and Eastern District for the year 1948 as adjusted to July 1, 1950, calculating such fully-distributed and out-of-pocket costs in general accordance with the Rail Form A Formula. As will appear from reference thereto the comparison demonstrates that the

revenues from the prescribed rates fail by a substantial margin to equal the out-of-pocket costs as computed under the formula and consequently fail to a much greater extent to equal the fully-distributed costs of the service.

(g) Petitioners further aver that the costs set forth in Appendices D, E and F hereto do not fully reflect the costs to them of handling the traffic involved as those costs are based on Rail Form A Formula territorial average unit costs which do not fully reflect the special services, including [fol. 15] ing diversions and reconsignments, and expedited train services, accorded the traffic involved. Petitioners are informed and believe, and therefore aver, that the per cent of empty return movement for refrigerator cars used in computing the costs shown in Appendices D, E and F which per cents are explained in footnote 4 thereto, are substantially less than the actual per cents of empty return movement experienced on the traffic involved. Southwestern defendants further aver that The Atchison, Topeka & Santa Fe Railway; The Chicago, Rock Island and Pacific Railroad and the Ft. Worth and Denver City Railway should be excluded from the Southwestern Group in computing costs on the traffic involved in Appendices D, E and F, and that the cost figures on said appendices would be higher if such were done.

Wherefore, petitioners respectfully urge the Commission (a) to reopen this proceeding for further hearing for the purpose of receiving evidence hereinbefore described and of affording to petitioners the opportunity of proving the rates prescribed, the effect of such rates upon petitioners' revenues, and the confiscatory nature of such rates; (b) to reconsider its decision and order of December 21, 1950, in the light of the record in this proceeding as supplemented at such further hearing, and (c) to postpone until further order the effective date of the order of December 21, 1950, as modified by order of February 28, 1951, pending such further hearing and reconsideration.

Respectfully submitted, Robert H. Bierma, J. P. Canny, Leo P. Day, A. S. Knowlton, Robert Thompson, Joe G. Fender, S. R. Brittingham, Jr., Clyde

W. Fiddes, James G. Blaine, Wm. E. Davis, Seth W. Barwise, Toll R. Ware, James B. Gray, Attorneys for Petitioners.

March 16, 1951.

2008 Missouri Pacific Building,
St. Louis 3, Missouri.

Certificate of Service

I hereby certify that I have this day served the foregoing document upon all parties of record in accordance with the Rules of Practice.

Dated at St. Louis this 16th day of March, 1951.

James B. Gray.

[fol. 16]

APPENDIX A TO EXHIBIT 2 Present and Prescribed Rates

To:	Detroit		Pittsburgh		New York		Portland, Me.	
From Harlingen	A	B	A	B	A	B	A	B
Carrots with tops	163½	151½	167½	155½	181½	167½	189½	174½
Spinach	180	165½	186	169½	209	183½	217	191½
Lettuce	177	165½	183	169½	205	183½	211	191½
Tomatoes	168	165½	174	169½	197	183½	205	191½
Green Corn	168	164½	174	168½	197	182½	205	190½
Broccoli	168	164	174	168	192	182	200	190
From Jacksonville								
Tomatoes	161	140	168	146	188	163	193	167

A—Present Rates; B—Prescribed Rates.

Minimum Weights Prescribed

Carrots, with tops—	28,000 lbs.; other vegetables—20,000 lbs.
	Present
Carrots, with tops—	24,000 lbs.
Spinach—	18,000 lbs. to Cairo or Thebes, Ill., 17,500 lbs. beyond.
Lettuce—	18,000 lbs. to Cairo or Thebes, Ill., 16,000 lbs. beyond.
Tomatoes—Harlingen—	23,500 lbs. to Cairo or Thebes, Ill., 20,000 lbs. beyond.
Jacksonville—	20,000 lbs.
Green Corn—	24,000 lbs.
Broccoli—to Detroit and Pittsburgh—	24,000 lbs. to Cairo or Thebes, 20,000 lbs. beyond.
	to New York and Portland, Me.—24,000.

[fol. 17]

APPENDIX B TO EXHIBIT 2

Through Revenue on Traffic Subject to Order Which Originated in Texas
on G. C. L. and St. L. S. W. of Texas During 1949-50 Season

	Cars	Present Revenue	Prescribed Revenue	Reduction
Gulf Coast Lines				
Carrots, with tops	2,998	1,227,731.31	1,218,891.84	8,839.47
Other Veg.—Straight Carloads	3,346	1,474,584.93	1,415,499.94	59,084.99
Mixed Vegetables	2,726	1,130,877.52	1,116,741.55 (1)	14,135.97 (1)
Total	9,070	3,833,193.76	3,751,133.33	82,060.43

St. L. S. W. of Texas

Other Veg.—Straight Carloads	684	315,272.19	273,867.41	41,404.78
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(1) Estimated by reducing present revenue 1.25%, which is $\frac{1}{2}$ the per cent of reduction for other traffic involved originating on the Gulf Coast Lines.

[fol. 18]

APPENDIX C TO EXHIBIT 2

Revenue Per Car and Per Car-Mile at Prescribed Rates to New York City
Short-Line Distances

Vegetable	Origin	Short-Line Distance	Rate	Prescribed Minimum Weight	—Revenue— Per Car (Dollars)	Per Car-Mile (Cents)
Carrots with tops	McAllen	2,018	167½	28,000	469.00	23.24
Spinach	San Benito	2,014	183½	20,000	367.00	18.22
Lettuce	Harlingen	2,008	183½	20,000	367.00	18.28
Tomatoes	Jacksonville	1,573	163	20,000	326.00	20.72
Green Corn	Weslaco	2,027	182½	20,000	365.00	18.01
Broccoli	Laredo	2,012	182	20,000	264.00	18.09

Reasonable Service Routes

Vegetable	Origin	Route	Distance	Rate	Prescribed Minimum	—Revenue— Per Car (Dollars)	Per Car-Mile (Cents)
Carrots with tops	McAllen	1	2,230	167½	28,000	469.00	21.03
Spinach	San Benito	1	2,215	183½	20,000	367.00	16.57
Lettuce	Harlingen	1	2,209	183½	20,000	367.00	16.61
Tomatoes	Jacksonville	1	1,691	163	20,000	326.00	19.28
Green Corn	Weslaco	1	2,223	182½	20,000	365.00	16.42
Broccoli	Laredo	1	2,130	182	20,000	364.00	17.09

1. Mo. Pac. Lines, Longview, T. & P., Texarkana, Mo. Pac., St. Louis, P. R. R.

[fol. 19]

APPENDIX D TO EXHIBIT 2

Comparison of Revenue Under Prescribed Rates on Texas Vegetables With Full Cost (Including and Excluding 6% Return) for Traffic Moving in Refrigerator Cars

	14-Ton Load (Carrots With Tops)	12-Ton Load (Other Vegetables)
Cars.....	1,475	5,560
Tons.....	19,122	66,354
Out-of-Pocket and Constant Costs, Including 6% Return		
Terminal.....	\$ 47,844.22	\$ 189,622.21
Line Haul.....	757,524.34	2,904,205.56
Loss and Damage.....	22,755.18	578,961.26
Total.....	\$828,123.74	\$3,172,789.03
6% Return		
Terminal.....	\$ 5,005.34	\$ 19,562.22
Line Haul.....	83,875.11	312,092.56
Total.....	\$ 88,880.45	\$ 331,654.78
Costs, Excluding 6% Return.....	\$739,243.29	\$2,841,134.25
Revenue Under Prescribed Rates.....	670,302.90	2,322,405.55
Income Before 6% Return.....	Def. \$ 68,940.39	Def. \$ 518,728.70

Notes:

1. Traffic from Rio Grande Valley (Gulf Coast Lines) to Official Classification Territory east of Illinois-Indiana State Line, 1949-1950 season.

2. Out-of-Pocket and constant costs, including 6% Return, based on application of Rail Form A-47, "Formula for Use in Determining Rail Freight Service Costs," prepared by Cost Section, Bureau of Accounts and Cost Finding, I. C. C., for year 1948 with costs other than Return adjusted to reflect cost levels of July 1, 1950.

Cost factors for Southwestern Region carriers, plus A. T. & S. F., C. R. I. & P. and F. W. & D. C., were applied to movements west of East St. Louis and Eastern District cost factors were applied to movement east thereof.

3. Loss and Damage costs based on 1949 L. & D. claim payments per ton originated for the United States.

4. Costs based on empty refrigerator car movement (ratio of empties to loads) of 75% for Eastern District and 65% for Southwestern Region roads as developed from I. C. C. Statement No. 3-49, Appendix A, and underlying data.

5. Revenue under prescribed rates for other vegetables includes 2,599 carloads of mixed vegetables, the prescribed revenue for which was estimated by reducing present revenue thereon by 1.25%.

[fol. 20]

APPENDIX E TO EXHIBIT 2

Comparison of Revenue Under Prescribed Rates on Vegetables With Full Costs (Including Special Terminal Costs) for Traffic Moving in Refrigerator Cars

	14-Ton Load (Carrots With Tops)	12-Ton Load (Other Vegetables)
Cars.....	1,475	5,568
Tons.....	19,122	66,354
Out-of-Pocket and Constant Costs, Including 6% Return		
Terminal.....	\$ 96,942.28	\$ 396,978.35
Line Haul.....	757,524.34	2,904,205.56
Loss and Damage.....	22,755.18	78,961.26
Total.....	\$877,221.80	\$3,380,145.17
Revenue Under Prescribed Rates.....	670,302.90	2,322,405.55
Excess of Revenue Over Costs.....	Def. \$206,918.90	Def. \$1,057,739.62

Notes:

1. Traffic from Rio Grande Valley (Gulf Coast Lines) to Official Classification Territory east of the Illinois-Indiana State Line, 1949-1950 season.

2. Out-of-Pocket and constant costs, including 6% Return, based on application of Rail Form A-47, "Formula for Use in Determining Rail Freight Service Costs," prepared by Cost Section, Bureau of Accounts and Cost Finding, I. C. C., for year 1948 with costs other than Return adjusted to reflect cost levels of July 1, 1950.

Cost factors for Southwestern Region carriers, plus A. T. & S. F., C. R. I. & P. and F. W. & D. C., were applied to movements west of East St. Louis and Eastern District cost factors were applied to movement east thereof.

Special gathering costs developed by studies in the Southwest were substituted for the average terminal costs produced by the formula and applied to all the traffic. Special terminal costs developed by studies at five large markets in the East were substituted for the average terminal costs produced by the formula and applied to traffic destined to the eight principal Eastern markets, i. e., Boston, New York, Philadelphia, Baltimore, Pittsburgh, Buffalo, Cleveland and Detroit. The average terminal costs produced by the formula were applied to the balance of traffic destined to Official Territory.

If the Commission affirms its decision in I. & S. 5500, Unloading Charges, Fruits and Vegetables, New York and Philadelphia, 272 I. C. C. 648, the costs shown would be reduced by approximately 75 cents per ton.

3. Loss and Damage costs based on 1949 L. & D. claim payments per ton originated for the United States.

4. Costs based on empty refrigerator car movement (ratio of empties to loads) of 75% for Eastern District and 65% for Southwestern Region roads as developed from I. C. C. Statement No. 3-49, Appendix A, and underlying data.

5. Revenue under prescribed rates for other vegetables includes 2,599 carloads of mixed vegetables, the prescribed revenue for which was estimated by reducing present revenue thereon by 1.25%.

[fol. 2i]

APPENDIX F TO EXHIBIT 2

Comparison of Revenue Under Prescribed Rates on Texas Vegetables With Full and Out-of-Pocket Costs for Traffic Moving in Refrigerator Cars

	14-Ton Load (Carrots With Tops)	12-Ton Load (Other Vegetables)
Cars.....	1,475	5,560
Tons.....	19,122	66,354
Out-of-Pocket and Constant Costs, Including 6% Return		
Terminal.....	\$ 47,844.22	\$ 189,622.21
Line Haul.....	757,524.34	2,904,205.56
Loss and Damage.....	22,755.18	78,961.26
Total.....	\$828,123.74	\$3,172,789.03
Constant Costs		
Terminal.....	\$ 4,797.45	\$ 16,647.29
Line Haul.....	83,872.48	285,393.34
Total.....	\$ 88,669.93	\$ 302,040.63
Out-of-Pocket Costs		
Terminal.....	\$ 43,046.77	\$ 172,974.92
Line Haul.....	673,651.86	2,618,812.22
Loss and Damage.....	22,755.18	78,961.26
Total.....	\$739,453.81	\$2,870,748.40
Revenue Under Prescribed Rates.....	670,302.90	2,322,405.55
Excess of Revenue Over Out-of-Pocket Costs.....	\$ 69,150.91	\$ 548,342.85

Notes:

1. Traffic from Rio Grande Valley (Gulf Coast Line) to Official Classification Territory east of Illinois-Indiana State Line, 1949-1950 season.

2. Out-of-Pocket and constant costs, including 6% Return, based on application of Rail Form A-47, "Formula for Use in Determining Rail Freight Service Costs," prepared by Cost Section, Bureau of Accounts and Cost Finding, I. C. C., for year 1948 with costs other than Return adjusted to reflect cost levels of July 1, 1950.

Cost factors for Southwestern Region carriers, plus A. T. & S. F., C. R. I. & P. and F. W. & D. C., were applied to movements west of East St. Louis and Eastern District cost factors were applied to movement east thereof.

3. Loss and Damage costs based on 1949 L. & D. claim payments per ton originated for the United States.

4. Costs based on empty refrigerator car movement (ratio of empties to loads) of 75% for Eastern District and 65% for Southwestern Region roads as developed from I. C. C. Statement No. 3-49, Appendix A, and underlying data.

5. Revenue under prescribed rates for other vegetables includes 2,599 carloads of mixed vegetables, the prescribed revenue for which was estimated by reducing present revenue thereon by 1.25%.

[fol. 22]

EXHIBIT 3 TO COMPLAINT

Order of the Commission dated August 1, 1951

~~ORDER~~

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 1st day of August, A. D. 1951.

No. 30074

Texas Citrus and Vegetable Growers and Shippers

v.

Atchison, Topeka, & Santa Fe Railway Company et al.

Upon consideration of the record in the above-entitled proceeding and of petitions of (1) Western Growers Association, intervener, for reconsideration; (2) transcontinental railroads for reconsideration of Finding 3 in the report of the Commission in said proceeding, decided December 21, 1950; and (3) southwestern and eastern railroads for further hearing and reconsideration; and for good cause appearing:

It is ordered, That the said proceeding be, and it is hereby, reopened for reconsideration on the record as made.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

Report and Order of the Commission dated
January 7, 1952

INTERSTATE COMMERCE COMMISSION

No. 30074

Texas Citrus and Vegetable Growers and Shippers

v.

Atchison, Topeka & Santa Fe Railway Company et al.

Decided January 7, 1952

Upon reconsideration:

1. Findings in prior report, 279 I. C. C. 671, prescribing reasonable bases of rates on carrots, in carloads, from Texas to official, southern and western trunk-line territories, and on certain other vegetables from Texas to official territory, modified, principally as to form.
2. Record found inadequate to support a finding under Section 1 as to rates on vegetables, in carloads, from Texas to points in Arizona and California.

Appearances as shown in prior report.

Report of the Commission on Reconsideration

By the Commission:

Complainant herein assailed the rates¹ on vegetables, in carloads, from Texas origins to destinations in the United States other than Texas, as unreasonable, unduly prejudicial to Texas growers and shippers, and unduly preferential of vegetable growers and shippers in Arizona, California and New Mexico. We were asked to prescribe lawful rates for the future.

In the prior report, 279 I. C. C. 671, we found that the

¹Rates are stated in amounts per 100 pounds, and do not include general increases authorized on and after March 12, 1951.

assailed rates on carrots with tops, in carloads, from points in Texas to destinations in official, western trunk-line, and southern territories, are and for the future will be unreasonable to the extent that they exceed or may exceed column 30 rates, minimum 28,000 pounds, based on the same first-class or class-100 rates as the present column ratings, the present arbitraries over Corpus Christi, Tex., where applicable, to be observed as maxima.

We further found that the assailed rates on vegetables, fresh or green (other than cold pack), as described under the heading "Vegetables, fresh or green" in western classification, other than those on cabbage, carrots with tops, onions without tops and potatoes (including sweet potatoes and yams), from Texas origins to destinations in official territory east of Illinois classification territory, are and for the future will be unreasonable to the extent that they result in charges which exceed or may exceed those which would result from the application of column-33.5 rates, minimum 20,000 pounds, based on the first-class or column-100 rates and arbitraries specified in the finding referred to in the preceding paragraph.

We further found that the assailed rates from points in Texas to points in Arizona and California are and will be unreasonable to the extent that they exceed or may exceed the present rates on like traffic eastbound between the same points, subject to the carload minimum weight on such eastbound traffic.

We further found that in other respects the assailed rates are not shown to be unreasonable, and that the allegation of undue prejudice and preference has not been sustained. An appropriate order was entered.

Upon petitions of (1) the Western Growers Association, intervener, for reconsideration; (2) transcontinental railroads for reconsideration of the finding relating to rates from Texas to Arizona and California; and (3) southwestern and eastern railroads for further hearing and reconsideration in the light of the record as supplemented at such further hearing, we denied the petitions insofar as further hearing was requested and reopened the proceeding for reconsideration on the record as made. The effective

date of the order entered herein was postponed until our further order.

A comprehensive statement of the pertinent facts is contained in the prior report. It is amplified herein only with reference to certain contentions of the defendant transcontinental carriers.

Petitioner Western Growers Association limited its participation in this proceeding to the issue of undue prejudice. It agrees with our findings with respect to that issue and says it does not make any complaint about the findings concerning reasonableness. As those findings are the only ones to which the defendants' petitions are directed, no [fol. 25] further consideration of the matters discussed in that intervenor's petition is called for.

The petition of the transcontinental carriers relates to the finding as to westbound rates only. It prays reconsideration of certain matters to which our attention is directed. These petitioners aver there is abundant evidence that the eastbound rates from California and Arizona to Texas are not reasonable maximum rates, and that the use of such rates as a basis for the prescribed rates westbound would result in improvident reductions of their revenue on a substantial volume of traffic moving regularly between the involved points. The evidence relied upon to show that the eastbound rates are not reasonable maxima consists principally of general statements that they are widely blanketed, an example of which was given in the original report, and that they were reduced to meet competition of unregulated truckers, an assertion otherwise unsupported in the record by evidence of specific truck movements. On the other hand, the evidence discloses a movement on the assailed rates in 1946, 1947 and 1948 to Los Angeles, Calif., of 311, 64 and 72 cars, respectfully, and to San Francisco of 333, 68 and 101 cars, respectfully. It also shows movement by truck from Texas for those years equivalent to 220, 42 and 325 cars to Los Angeles and 17, 3 and 72 cars to San Francisco.

With respect to the revenue effect of the reductions resulting from the prescribed westbound rates, in the prior report we referred to the relatively light movement by rail to four Pacific Coast cities from Texas as compared with those

from mountain-Pacific States, and stated the number of carlot unloads of several vegetables at those cities. As our findings were limited to Arizona and California we have re-examined the evidence as to shipments of the principal vegetables produced in Texas. The figures shown are those for 1947. In that year rail shipments of carrots, onions, potatoes, tomatoes, cabbage and mixed vegetables from Texas totaled 48,070 cars. Shipments of all other vegetables were less than 7,000 cars. Of the 48,070 cars, only 100 cars moved to the California cities of Los Angeles, Oakland, San Diego, San Francisco and to Phoenix, Ariz. Shipments of the vegetables named, including mixed vegetables, from California and Arizona to Amarillo, Beaumont, Dallas, El Paso, Fort Worth, Houston and San Antonio, Tex., were 4,193 carloads. There were 1,255 carloads, excluding 2,938 cars of potatoes. The movement of potatoes westbound in 1947 to the cities named was 40 cars. Petitioners concede that as to the rates on sweet potatoes the record is clear that consideration should be given to establishment of a more competitive westbound adjustment, and state that they have undertaken a study of those rates. The record is clear that the westbound rates on many of the more important vegetables do not permit of a free movement, such as that eastbound to Texas. The evidence, [fol. 26] however, as to these rates is not sufficiently comprehensive to afford a basis for a prescription of maximum reasonable rates.

In their petition the defendant southwestern and eastern railroads do not point to any lack of support in the record for the findings made in our prior report. However, they assert that the order is not clear as to the rates prescribed in our findings 1 and 2. Those findings, as herein modified, will provide any necessary clarification.

Upon reconsideration of the record herein we find:

1. That the assailed rates on carrots, with tops, in carloads, minimum weight 28,000 pounds, from points in Texas to destinations in official, western trunk-line, and southern territories, are and for the future will be unreasonable to the extent that they exceed or may exceed the rates set forth in scale A in the appendix to this report.

2. That the assailed rates on vegetables fresh or green (other than cold pack), as described under the heading "Vegetables, fresh or green" in western classifications, other than those on cabbage, carrots, with tops, onions, without tops, and potatoes (including sweet potatoes and yams), in straight or mixed carloads, minimum weight 20,000 pounds, from points in Texas to destinations in official territory east of Illinois classification territory are and for the future will be unreasonable to the extent that they exceed or may exceed the rates set forth in scale B in the appendix hereto.

3. That the record affords an inadequate basis for a finding under section 1 as to the assailed westbound rates to Arizona and California.

In publishing rates on the bases prescribed, (a) distances shall be computed over the shortest routes over which carload traffic can be transported without transfer of loading; (b) publication of rates from known shipping points to the destinations indicated will be considered as substantial compliance with the foregoing findings; (c) origins in the lower Rio Grande Valley, including Harlingen, in the Laredo section, and in the Eagle Pass-Winter Garden section should be grouped, and (d) reasonable grouping of other origins and destinations will be permitted, the rates from and to grouped points to represent a fair average of rates constructed on the mileage basis set forth in the appendix.

Findings 1, 2 and 3 in the original report are modified accordingly and finding 4 therein is affirmed.

To all rates herein prescribed may be added the general increases authorized in Ex Parte No. 175, Increased Freight Rates, 1951, 281 I. C. C. 557.

An appropriate order will be entered.

[fol. 27] Cross, Commissioner, dissenting:

I disagree with the findings concerning the rates on carrots and certain other vegetables to southern territory and to certain portions of official and western trunk-line territories. The prescribed rates, in my judgment, are lower than the record warrants. This report, in substance, affirms findings 1 and 2 of the prior report by substituting

for the percentage bases used in the prior report two mileage scales, the levels of which approximate the average of the levels prescribed in the prior findings.

Since the territorial scope of this proceeding embraces a large portion of that dealt with in the third supplemental report in No. 28300, Class Rate Investigation, 1939, 281 I. C. C. 213, decided July 26, 1951, after our prior report herein, I believe that distance rates on this traffic should reflect gradations based on the scale of first-class (class 100) rates set out in appendix 18 to the report. That scale provides a common basis from Texas points to official, southern and western trunk-line territories, and generally is on a lower level from and to those points than the class rate scale basis used in the prior report, plus comparable general increases.

I would prescribe, for example, to New York City on carrots from McAllen, Tex., 32.5 percent of the foregoing basis, minimum 28,000 pounds, and on lettuce from Harlingen, Tex., 35 percent, minimum 24,000 pounds, or 37.5 percent, minimum 20,000 pounds. These percentages would produce rates for distances approximating 2,010 miles of 179 cents per 100 pounds on carrots, and 192 cents, minimum 24,000 pounds, and 206 cents, minimum 20,000 pounds, on lettuce. The report prescribes 167 cents, minimum 28,000 pounds, on carrots and 182 cents, minimum 20,000 pounds, on lettuce. Also I would prescribe on beets, parsnips, turnips, rutabagas, with or without tops, the same basis as on carrots.

I am authorized to state that Chairman Rogers and Commissioners Lee, Johnson and Mitchell join in this expression.

{fol. 28]

APPENDIX

Reasonable maximum distance scales of rates for application on carrots, with tops, minimum weight 28,000 pounds, and on other vegetables, as described in finding 2 of this report, minimum weight 20,000 pounds.

Scale A			Scale B		
Carrots, With Tops		Other Vegetables	Carrots, With Tops		Other Vegetables
Distance Miles	Cents	Cents	Distance Miles	Cents	Cents
700	101	120	1575	149	164
725	102	121	1600	150	165
750	104	123	1625	151	166
775	105	124	1650	152	167
800	107	125	1675	153	168
825	108	126	1700	154	169
850	110	128	1725	155	170
875	111	129	1750	156	171
900	113	130	1775	157	172
925	115	131	1800	158	173
950	116	133	1825	159	174
975	118	134	1850	160	175
1000	119	135	1875	161	176
1025	121	136	1900	162	177
1050	122	138	1925	163	178
1075	124	139	1950	164	179
1100	125	140	1975	165	180
1125	126	141	2000	166	181
1150	128	143	2025	167	182
1175	129	144	2050	168	183
1200	130	145	2075	169	184
1225	131	146	2100	170	185
1250	133	148	2125	171	186
1275	134	149	2150	172	187
1300	135	150	2175	173	188
1325	136	151	2200	174	189
1350	138	153	2225	175	190
1375	139	154	2250	176	191
1400	140	155	2275	177	192
1425	141	156	2300	178	193
1450	143	158	2325	179	194
1475	144	159	2350	180	195
1500	145	160	2375	181	196
1525	146	161	2400	182	197
1550	148	163			

[fol. 29]

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of January, A. D. 1952.

No. 30074

Texas Citrus and Vegetable Growers and Shippers

v.

Atchison, Topeka & Santa Fe Railway Company et al.

It appearing, That on December 21, 1950, the Commission made and filed a report and entered an order in the above-entitled proceeding, and that on August 1, 1951, this proceeding was reopened for reconsideration;

It further appearing, That the proceeding has been reconsidered and that the Commission, on the date hereof, has made and filed a report on reconsideration, containing its findings of fact and conclusions thereon, which said report and the aforesaid report of December 21, 1950, are hereby referred to and made a part hereof:

It is ordered, That the aforesaid order of December 21, 1950, be, and it is hereby, vacated and set aside.

It is further ordered, That the defendants named in the complaint, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before April 24, 1952, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of the commodities specified from and to the points designated in the succeeding paragraphs hereof, rates which exceed those prescribed in said paragraphs.

It is further ordered, That the defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before April 24, 1952, upon notice to this Commission and the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation of carrots, with tops, in carloads, minimum weight 28,000 pounds, from points in Texas to points in official,

western trunk-line and southern territories, rates which shall not exceed those set forth in scale A in the appendix to said report on reconsideration.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before [fol. 30] April 24, 1952, upon notice to this Commission and the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation of vegetables, fresh or green (other than cold pack), as described under the heading "Vegetables, fresh or green" in western classification, except on cabbage, carrots, with tops, onions, without tops, and potatoes (including sweet potatoes and yams), in straight or mixed carloads, minimum weight 20,000 pounds, from points in Texas to destinations in official territory east of Illinois classification territory, rates which shall not exceed those set forth in scale B in the appendix to said report on reconsideration.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 31]

EXHIBIT 5 TO COMPLAINT

Plaintiffs' Petition Dated February 15, 1952

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 30074

TEXAS CITRUS AND VEGETABLE GROWERS AND SHIPPERS,
Complainant,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
ET AL., Defendants.

Defendants' Answer to Complainant's Petition to Advance
the Effective Date

Defendant's Petition for Further Hearing to Demon-
strate the Confiscatory Nature of the Rates Prescribed
in the Order Dated January 7, 1952, and Postponement
of the Effective Date of that Order

Come now the defendants in the above-entitled cause and
file this, their answer to the petition of the complainant to
advance the effective date of the order herein to March 15,
1952, and their petition for further hearing to demonstrate
the confiscatory nature of the rates prescribed in the order
dated January 7, 1952 and postponement of the effective
date of that order, and state in support thereof:

I

On March 19, 1951, subsequent to the issuance of the first
report and order in the above-entitled proceeding, defend-
ants filed a petition with the Commission for further hear-
ing to receive certain cost evidence, and for the Commission
to thereafter reconsider its report and order on the record
as supplemented by this evidence introduced at the sought
further hearing. The prayer which was set forth in this
petition stated:

Wherefore, petitioners respectfully urge the Commis-
sion (a) to reopen this proceeding for further hearing

for the purpose of receiving evidence hereinbefore [fol. 32] described and of affording to petitioners the opportunity of proving the rates prescribed, the effect of such rates upon petitioners' revenues, and the confiscatory nature of such rates; (b) to reconsider its decision and order of December 21, 1950, in the light of the record in this proceeding as supplemented at such further hearing, and (c) to postpone until further order the effective date of the order of December 21, 1950, as modified by order of February 28, 1951, pending such further hearing and reconsideration. (Emphasis supplied.)

This petition for further hearing was denied by order of the Commission dated August 1, 1951. This proceeding, however, was reopened for further consideration upon the record as made. Subsequently, the Commission issued its report dated January 7, 1952 which report, insofar as the rates from Texas origins to Official Territory were concerned, simply clarified the findings in the report issued December 21, 1950.

To this subsequent report and order, Chairman Rogers and Commissioners Cross, Lee, Johnson and Mitchell dissented on the ground that the prescribed rates stated in the report were "lower than the record warrants." It should be pointed out that in the petition for rehearing which was filed by defendants on March 19, 1951, certain appendices were set forth therein which demonstrated that the rates prescribed by the Commission in the original report, which rates approximate those prescribed in the subsequent report dated January 7, 1952, were confiscatory and deprived defendants of their property without due process of law in violation of the Constitution of the United States of America.

II

Upon receipt of the report dated January 7, 1952 defendants made further careful studies to determine whether the prescribed basis of rates set forth thereto were confiscatory. These further studies, in the same manner as shown by the studies set forth in the appendices to the petition for rehearing, revealed that said rates, upon the basis of present

costs, were confiscatory and if made effective, would deprive defendants of their property without due process of law. Preliminary action, therefore, has thus been taken by the defendants to prepare to enjoin the action of the Commission. It is anticipated that said action will be filed in the Federal Court on or about March 10, 1952. Upon filing such action, steps will be taken by defendants to secure, either through the issuance of a preliminary injunction or through voluntary action of the Commission, itself, a postponement of the effective date of the order. It is believed by respondents that the target date set as of March 10, 1952 is sufficiently early so as to permit all parties full [fol. 33] preparation. The action requested by the complainant in its petition to advance the effective date would foreclose the complainant, defendants, and the other interested parties from the opportunity for such full preparation.

Under the circumstances set forth hereinbefore, defendants respectfully request that the Commission either reopen this proceeding for further hearing to receive cost evidence which would show the confiscatory nature of the prescribed rates and postpone the effective date of the order or, in the alternative, deny the petition of complainant to advance the effective date.

In view of the urgency of the situation, the Commission is requested to take steps to either grant this petition or to deny the petition of complainant as quickly as possible.

Respectfully submitted, J. P. Canny, Leo P. Day, A. S. Knowlton, Robert Thompson, Joe G. Fender, S. R. Brittingham, Jr., Clyde W. Fiddes, James G. Blaine, Wm. E. Davis, Seth W. Barwise, Toll R. Ware, James B. Gray, Robert H. Bierma, Attorneys for Defendants.

February 15, 1952.

652 Union Station,
Chicago 6, Illinois.

Certificate of Service.

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding by mailing a copy thereof by first class mail, properly addressed, to each party.

Dated at Chicago, Illinois, this 15th day of February 1952.

Robert H. Bierma.

[fol. 34] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ORGANIZING A THREE-JUDGE COURT—Filed
March 11, 1952

The Baltimore & Ohio Railroad Company, a corporation, et al, plaintiffs in the above entitled matter, having filed suit which is now pending in the United States District Court for the Eastern District of Missouri, seeking to set aside and annul a certain order of the Interstate Commerce Commission and seeking temporary and permanent injunction against the Interstate Commerce Commission restraining it from enforcing said order, on the ground, among others, that the said order is violative of certain provisions of the Constitution of the United States, and said application for injunction having been presented to the Honorable Roy W. Harper, United States District Judge for the Eastern District of Missouri, and said Judge having notified the Chief Judge of the United States Court of Appeals for the Eighth Circuit thereof;

It is now here ordered that Honorable Seth Thomas, United States Circuit Judge, and Honorable George H. Moore, United States District Judge for the Eastern District of Missouri, be and they hereby are designated to sit with the above named Honorable Roy W. Harper, United States District Judge for the Eastern District of Missouri, to hear and determine said action and proceeding.

Dated this 10th day of March, A. D. 1952.

/s/ Archibald K. Gardner, Chief Judge of the United States Court of Appeals, for the Eighth Circuit.

[fol. 35] IN UNITED STATES DISTRICT COURT

[Title omitted]

FIRST AMENDED COMPLAINT—Filed March 24, 1952

To the Honorable Judges of the United States District Court for the Eastern District of Missouri, Eastern Division:

Now come plaintiffs, and for their cause of action against the United States of America, defendant, respectfully state:

[fol. 36]

I

Plaintiffs are:

The Baltimore and Ohio Railroad Company, a railroad corporation organized and existing under the laws of the State of Maryland,

Boston and Maine Railroad, a railroad corporation organized and existing under the laws of the Commonwealth of Massachusetts,

Erie Railroad Company, a railroad corporation organized and existing under the laws of the State of New York,

Guy A. Thompson, a resident of the State of Missouri who is the duly appointed, qualified and acting trustee of the following railroad corporations:

Missouri Pacific Railroad Company,

New Orleans, Texas & Mexico Railway Company,

The Beaumont, Sour Lake & Western Railway Company,

The St. Louis, Brownsville and Mexico Railway Company,

International-Great Northern Railroad Company,

San Antonio, Uvalde & Gulf Railroad Company,

San Benito and Rio Grande Valley Railway Company,

The New York Central Railroad Company, a railroad corporation, organized and existing under the laws of the States of New York, Pennsylvania, Ohio, Indiana, Michigan and Illinois,

The New York, Chicago and St. Louis Railroad Company, a railroad corporation organized and existing under the laws of the States of New York, Pennsylvania, Indiana, Illinois and Ohio,

The New York, New Haven and Hartford Railroad Co., a railroad corporation organized and existing under the laws of the States of Connecticut, Massachusetts and Rhode Island,

The Pennsylvania Railroad Company, a railroad corporation organized and existing under the laws of the State of Pennsylvania,

St. Louis Southwestern Railway Company, a railroad corporation organized and existing under the laws of the State of Missouri,

St. Louis Southwestern Railway Company of Texas, a railroad corporation organized and existing under the laws of the State of Texas,

Texas and New Orleans Railroad Company, a railroad corporation organized and existing under the laws of the State of Texas;

The Texas and Pacific Railway Company, a railroad corporation organized and existing under the laws of the United States,

Wabash Railroad Company, a railroad corporation organized and existing under the laws of the State of Ohio.

II

Defendant is the United States of America.

III

[fol. 37]

This is a suit to enjoin, set aside, annul and suspend a certain order of the Interstate Commerce Commission (hereinafter called the Commission) made and entered January 7, 1952, in a proceeding, instituted by complaint, entitled Texas Citrus and Vegetable Growers and Shippers v. Atchison, Topeka & Santa Fe Railway Company et al., No. 30074, on the Commission's docket. An earlier report and order in that proceeding was dated December 21, 1950, a copy of said report and order being attached hereto as Exhibit 1 and made a part hereof. (Reference to Exhibits

1 through 5 are references to such numbered exhibits filed with the original complaint herein.) This report is reported at 279 I. C. C. 671. Subsequent to the issuance of this order, plaintiffs, and other railroads subject to that order, filed a petition with the Commission to reopen the proceeding for further hearing in order to afford them the opportunity of proving, among others, the confiscatory nature of the rates prescribed in said order. Said petition was dated March 16, 1951, a copy of said petition being attached hereto as Exhibit 2 and made a part hereof. Said petition, after several postponements of the effective date of the order, was denied by order of the Commission dated August 1, 1951, a copy of said order being attached hereto as Exhibit 3 and made a part hereof. Thereafter, following several postponements of the effective date of the order, the Commission issued its further report and order on reconsideration dated January 7, 1952, a copy of said report and order being attached hereto as Exhibit 4 and made a part hereof. Thereafter, and contemporaneously with the filing of an answer to a petition to advance the effective date of said order, plaintiffs and other railroads subject to said order filed a further petition for rehearing to permit said railroads the opportunity of proving the confiscatory nature of the rates prescribed in the order, dated January 7, 1952 (Exhibit 4), a copy of said petition, dated February 15, 1952, being attached hereto as Exhibit 5 and made a part hereof. Said further petition was denied by order of the Commission on March 7, 1952, a copy of said order being attached hereto as Exhibit 6 and made a part hereof. Pursuant to the order of the Commission (Exhibit 4), and a subsequent order dated March 11, 1952, which extended the effective date of said order of January 7, 1952, plaintiffs and other railroads are required to file certain schedules of rates to be effective June 23, 1952, upon not less than 30 days prior filing and posting in the manner provided by Section 6 of the Interstate Commerce Act, as amended (49 U. S. C., § 6).

IV

This suit is brought pursuant to the provisions of an Act of Congress approved June 25, 1948, 62 Stat. 931, 936, 968-970, 63 Stat. 105, 28 U. S. C. §§ 1336, 1398, 2284, and

[fol. 38] 2321-2325, inclusive, and the jurisdiction of the Court rests upon these statutory grounds.

V

Plaintiffs bring this action on behalf of themselves and all other common carriers by railroad similarly situated who are required by the order of the Commission (Exhibit 4 hereto) to publish and make effective certain joint rates. The said common carriers by railroad number approximately 100, and it is, therefore, impracticable to bring them all before the Court. There is here presented a common question of law affecting the several rights of said common carriers by railroad—whether the order of the Commission is lawful—and a common relief is sought.

VI

The complaint before the Commission alleged that the rates on fresh vegetables, in carloads, from origins in Texas to destinations in the United States, other than in Texas, are unreasonable in violation of Section 1 of the Interstate Commerce Act, and unduly prejudicial to Texas growers and shippers, and unduly preferential of vegetable growers and shippers in Arizona, California and New Mexico in violation of Section 3 of said Act. 49 U. S. C., §§ 1 and 3. The complaint requested the Commission to prescribe rates for the future. The Commission found that the rates assailed did not violate Section 3 but that unreasonableness in violation of Section 1 existed in the rates on certain vegetables, in carloads, from origins in Texas to certain destination territories, as follows:

(1) Carrots, with tops, in carloads, to destinations in official, western trunk-line and southern territories (generally the territory east of the Rocky Mountains other than Texas, Oklahoma, Arkansas and the southern half of Missouri);

(2) Vegetables, fresh or green (other than cold pack) except cabbage, carrots with tops, onions without tops, and potatoes (including sweet potatoes and yams) to destinations in official territory east of Illinois classification territory (generally the territory

east of Illinois, excluding the Chicago industrial area in Indiana, and north of the Ohio River).

The Commission thereupon prescribed maximum rates on vegetables by its order of December 21, 1950, as more fully set forth in said order attached hereto and marked Exhibit 1.

VII

By petition dated March 16, 1951 (Exhibit 2), and filed with the Commission on March 21, 1951, plaintiffs and other railroads before the Commission operating in the southwest and official territories, requested the Commission to reopen its proceeding for reconsideration and for rehearing [fol. 39] to afford said railroads an opportunity to offer proof in support of their averment that the rates prescribed in the Commission's report dated December 21, 1950 (Exhibit 1) were confiscatory and if made effective, would deprive these parties of their property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States of America. By order, dated August 1, 1951, the Commission denied said petition and refused plaintiffs the opportunity of presenting such evidence to it (Exhibit 3). Said petition for rehearing contained tables showing that the revenue from a substantial portion of the traffic affected by the order, based upon the rates prescribed, would be materially less than the out-of-pocket costs for handling said portion of the traffic as computed by applying the "Formula For Use In Determining Rail Freight Service Costs" prepared by Cost Section, Bureau of Accounts and Cost Finding, of the Interstate Commerce Commission. On January 7, 1952, the Commission issued its further report and order on reconsideration (Exhibit 4). Said report and order states that the petition for rehearing described hereinbefore had been denied and that the Commission's further report on reconsideration would only provide "necessary clarification" of the earlier report and order dated December 21, 1950 (Exhibit 1). Five members of the Commission dissented from this report on the ground that the prescribed rates stated in the report were "lower than the record warrants." While the report and order dated January 7, 1952, provided for

a new method of calculation of the rates prescribed therein, the resulting rates approximate the average of the levels prescribed in the report and order dated December 21, 1950. In a petition dated February 15, 1952 (Exhibit 5), plaintiffs and other railroads subject to the order of January 7, 1952, again requested the Commission to grant a rehearing to afford the parties thereto an opportunity to offer proof in support of their averment that the rates prescribed in the report and order on recommendations were confiscatory and if made effective, would deprive them of their property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States of America. Said petition was denied by the Commission by its order dated March 7, 1952 (Exhibit 6).

VIII

No evidence of the type described in paragraph VII herein, showing plaintiff's costs of transportation and those of other railroads subject to the orders of December 21, 1950, and January 7, 1952, was introduced by plaintiffs or any other party into the record before the Commission in Docket 30074. Such cost evidence does not exist in that record save for plaintiffs' offer, and that of other railroads, in two petitions to tender such evidence upon rehearing so as to permit a comparison of said costs with the revenues which would result upon publication of the rates prescribed [fol. 40] in said orders. Plaintiffs and the other railroads subject to said orders did not, and could not foresee that confiscatory rates would be prescribed by the Commission in its orders.

IX

The refusal of the Commission to grant a rehearing as requested was, and is, arbitrary and capricious and an abuse of its discretion contrary to the provisions of paragraph (6) of Section 17 of the Interstate Commerce Act and deprives plaintiffs of their property without due process of law contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

X

The rates prescribed by said order of January 7, 1952 from Texas on the vegetables and to the territories more particularly described under paragraph VI hereinabove will yield to the carriers affected by the order, including plaintiffs herein, and to each of them, revenue less than the costs of providing the service covered by said rates. Said order, if the rates there prescribed are made effective pursuant thereto, would deprive plaintiffs and all others subject to that order, and each of them, of their property without due process of law, in contravention of the Fifth Amendment to the Constitution of the United States of America.

XI

By reason of the action of the Commission in its order of January 7, 1952, plaintiffs are left without an adequate remedy at law and will be subjected to irreparable damage if the relief hereinafter prayed for is not granted.

Wherefore, plaintiffs pray:

(1) That, pursuant to the statutes referred to in paragraph IV hereof, there shall be constituted to hear this case a special court of three judges, one of whom shall be a Circuit Judge;

(2) That process issue against defendant, United States of America;

(3) That, after not less than five days' notice to the Attorney General of the United States, the United States Attorney, and such other persons as may be defendants, the Court, after hearing, by interlocutory injunction, enjoin and restrain enforcement of the order of the Commission dated January 7, 1952 (Exhibit 4) pending final hearing and determination of this suit;

(4) That the Court, pending hearing and determination of plaintiffs' application for an interlocutory injunction, by order, temporarily restrain enforcement of the order of the Commission dated January 7, 1952 (Exhibit 4);

[fol. 41] (5) That, upon final hearing of this cause, at which time plaintiffs will introduce the evidence which the Commission refused to hear and which is described in two

petitions (Exhibits 2 and 5), both of which have been denied (Exhibits 3 and 6), showing that the rates prescribed are confiscatory, the Court adjudge that the order of the Interstate Commerce Commission (Exhibit 4) is unlawful, beyond the power of the Commission, arbitrary, confiscatory, and if made effective will deprive plaintiffs of their property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States of America; and that a decree be entered setting aside, annulling, suspending, and perpetually enjoining the enforcement, operation, and execution of said order; and that plaintiffs, and all other common carriers by railroad similarly situated, may have such other and further relief as may be deemed proper by the Court.

Respectfully submitted, Robert H. Bierma, H. D. Boynton, T. O. Broker, J. P. Canny, Richmond C. Coburn, Frank H. Cole, Jr., L. P. Day, R. B. Elster, R. J. Fletcher, James B. Gray, Toll R. Ware, Attorneys for Plaintiffs.

Notices and other documents served on plaintiffs should be served on

Richmond C. Coburn,
411 N. Seventh,
St. Louis 1, Mo.,

Toll R. Ware,
2008 Missouri Pacific Building,
St. Louis, Missouri.

I hereby certify that the above and foregoing First Amended Complaint was served upon Herbert H. Freer, Assistant United States Attorney this 24 day of March, 1952.

Toll R. Ware, Attorney for Plaintiffs.

[fol. 42] EXHIBIT 6 TO FIRST AMENDED COMPLAINT

Order of the Commission Dated March 7, 1952

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of March, A. D. 1952.

No. 30074

Texas Citrus and Vegetable Growers and Shippers

v.

Atchison, Topeka & Santa Fe Railway Company et al.

Upon consideration of the record in the above-entitled proceeding, of complainant's petition to advance the effective date of the Commission's order of January 7, 1952, requiring defendants to establish certain rates, of defendants' reply in opposition to complainant's petition with a cross petition for further hearing and postponement of the effective date of the order; and it appearing that the reasons set forth in said petitions in support thereof do not constitute good and sufficient cause to warrant granting the petitions:

It is ordered, That said petitions be, and they are hereby, denied.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR LEAVE TO INTERVENE—Filed May 2, 1952

To the Honorable Judges of said Court:

Comes now the Texas Citrus and Vegetable Growers and Shippers and moves the Court for leave to intervene in and

become a party to said proceeding as a defendant therein. It shows to the Court:

I.

The Texas Citrus and Vegetable Growers and Shippers is a non-profit membership corporation organized and existing under the laws of the State of Texas with principal office and place of business at Harlingen, Texas. It was the complainant in Docket 30074, Texas Citrus and Vegetable Growers and Shippers v. Atchison, Topeka & Santa Fe Railway Co., the decisions in which are under attack in this proceeding:

II

Petitioner has members located in all sections of the State of Texas engaged in producing and shipping vegetables by railroad to destinations involved in the rate orders here under attack. They have a direct interest in the rates charged and assessed on such shipments and are vitally concerned with the outcome of this proceeding. Petitioner has a right to intervene herein under the provisions of Section 2323, Title 28, United States Code. (28 USCA 2323).

Wherefore, the Texas Citrus and Vegetable Growers and Shippers prays leave to intervene and be treated as a party hereto, with the right to have notice of and appear as a [fol. 44] defendant in all hearings and other proceedings had in this cause.

Respectfully submitted, Texas Citrus and Vegetable Growers and Shippers, By Frank A. Leffingwell, Attorney for Petitioner.

Date: May 1, 1952.

Address: 1515 Praetorian Building,
Dallas 1, Texas.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted].

ORDER PERMITTING INTERVENTION—Filed May 2, 1952

On this the 2nd day of May, 1952, there was presented for consideration a motion by the Texas Citrus and Vegetable

Growers and Shippers for leave to intervene and be treated as a party defendant herein. The Court having considered said motion and it appearing that the Texas Citrus and Vegetable Growers and Shippers was the complainant in the proceeding before the Interstate Commerce Commission and has a right to intervene herein under Rule 24-(a)-1.

It is ordered that the Texas Citrus and Vegetable Growers and Shippers be, and it is hereby, granted leave to intervene in and become a party hereto.

_____, District Judge, _____, District Judge,
_____, Circuit Judge.

[fol. 46] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed May 2, 1952

To the Honorable Judges of said Court:

The Texas Citrus and Vegetable Growers and Shippers, intervening defendant herein, moves the Court to dismiss this case because the complaint fails to state a cause of action.

Frank A. Leffingwell, Attorney for Intervening Defendant, 1515 Praetorian Building, Dallas 1, Texas.

NOTICE OF MOTION

To Messrs. Robert H. Bierma, Chicago, Ill., Richmond C. Coburn, St. Louis, Mo., James B. Gray, New York, N. Y., Toll R. Ware, St. Louis, Mo., Attorneys for Plaintiffs.

Gentlemen:

Please take notice that the undersigned will bring the above motion on for hearing before this Court at St. Louis, Mo., on the 15th day of May, 1952, at 10:00 o'clock the forenoon of that day or as soon thereafter as counsel can be heard.

Frank A. Leffingwell, Attorney for Intervening Defendant.

Date: May 1, 1952.

[fol. 47] MEMORANDUM OF POINTS AND AUTHORITIES

1. No Allegations Concerning Hearing or Lack of Evidence

The primary issue in this case concerns the validity of an order of the Interstate Commerce Commission. Such orders, operating in future, cannot be annulled and set aside by the courts unless:

- (a) They are unsupported by evidence.
- (b) They are made without a hearing.
- (c) They exceed constitutional limits.
- (d) Or they are arbitrary and amount to an abuse of power.

See Board of Trade of Kansas City v. United States, 314 U. S. 534, 546. Neither the complaint nor the petitions to the Commission allege that the decision and order are unsupported by substantial evidence.

The complaint does not, and can not, allege that the Commission failed to grant plaintiffs a full and complete hearing. Two hearings were held in June, 1949, one at Harlingen, Texas, and one at Los Angeles, Calif. The hearings lasted four days and plaintiffs herein were given full opportunity to introduce any relevant testimony they had to offer. A proposed report was served by the Commission's Examiner, exceptions were filed and the case was orally argued before the entire Commission at Washington. The first decision was handed down December 21, 1950, (Ex. 1) eighteen months after the hearings closed. The case was reopened for further consideration and a supplemental decision and order were issued January 7, 1952, (Ex. 4).

2. No Allegations That Order Exceeds Constitutional Limits

Paragraph X of the complaint alleges that the revenues yielded by the prescribed rates will be less than the cost of the service and will result in taking their property without due process of law. The term "confiscatory rates" is also used in Paragraphs VII and VIII. There are no allegations of facts which would constitute the taking of the plaintiffs' property without due process of law under the

provisions of the 5th Amendment. The mere statement that the 5th Amendment has been violated is not sufficient. It is well settled that the due process clause of the 5th Amendment cannot be invoked without specifically alleging the [fol. 48] facts relied upon from which it must clearly appear that the act complained of will deny to the utility the just compensation safeguarded to it. *Beaumont, S. L. & W. RR. Co. v. United States*, 282 U. S. 74.

"The just compensation secured by the constitution does not mean a guaranty to a carrier as against the public of any fixed percentage of profit upon an investment." *Lehigh Valley Railroad Co. v. United States*, 204 Fed. 986.

The prescription of railroad freight rates involves two steps of substantially different character. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of the rate schedule conforming to that level, so as to eliminate discriminations and unfairness from its details. *Federal Power Commission v. Natural Gas Pipe Line Co.*, 315 U. S. 575, 584.

Cases of the first type are called revenue cases and are illustrated by *Ex Parte* 162, 166, 168 and 175, decided by the Commission in the last six years, the latest decision being handed down April 11, 1952. Freight rates on vegetables within the Southwest have been increased 71 per cent, with a maximum of 54 cents per 100 pounds, since June 1, 1946, with even greater increases to Official Territory. In those cases the Commission found that the increases authorized would yield these plaintiffs a fair return. No attack has been made on that finding.

The order here under attack was issued in the second type for the purpose of lining up the rates on vegetables from Texas to Official Territory more nearly on the level prescribed by the Commission or voluntarily published by these plaintiffs from other areas and to other destinations. The order reduced the rates on carrots from Texas to certain destinations in Official, Western Trunk-Line and Southern Territories. It reduced the rates on other vegetables, except cabbage, onions and potatoes, to a part of Official

Territory only. But the newly prescribed rates are still on a higher basis than from Arizona, California and New Mexico to the same destinations and on a higher basis than from Texas to other destinations.

To illustrate, the Southwestern railroads in 1940 published rates on vegetables based 14 cents per car mile for a minimum of 18,000 pounds per car and 84 per cent of that basis for a minimum of 24,000 pounds. (Ex. 1, Page [fol. 49] 677). At the time the decision here under attack was rendered those rates had been increased under the general revenue cases 49 per cent with a maximum of 42 cents per 100 pounds. For ready reference, the minimum revenue in dollars per car under the prescribed rates are compared with the increased revenue per car under the rates voluntarily published by these plaintiffs:

Distance Miles	Prescribed 28,000 Min.	Voluntary 24,000 Min.	Prescribed 20,000 Min.	Voluntary 18,000 Min.
700	\$282.80	\$122.66	\$240.00	\$146.02
725	285.60	127.04	242.00	154.23
750	291.20	131.42	246.00	156.45
775	294.00	135.80	248.00	161.66
800	299.60	140.18	250.00	166.88
825	302.40	144.83	252.00	172.09
850	308.00	148.94	256.00	177.31
875	310.80	153.32	258.00	182.50
900	316.40	157.70	260.00	187.74
925	322.00	162.08	262.00	192.95
950	324.80	166.46	266.00	198.17
975	330.40	170.84	268.00	203.38
1000	333.20	175.22	270.00	208.60
1025	338.80	179.60	272.00	213.81
1050	341.60	183.99	276.00	219.03
1075	347.20	188.37	278.00	224.25

Note: The above rates are now subject to a further increase of 15 per cent with a maximum of 12 cents per 100 pounds.

Many of the rates voluntarily published and applied by plaintiffs since 1940 yield less than half the revenue per car yielded by the rates prescribed in the order here under attack. It is a fair conclusion that plaintiffs would not voluntarily publish rates which do not yield substantially more than the cost of transporting the commodities.

Appendix A, Page 701 of Exhibit 1, shows rates on five vegetables in effect at the time of the decision from California and Texas to certain destinations. The present rates from California are rates voluntarily published and maintained by plaintiffs over a long period of time, except

for the general increases made since 1946. We show below those rates and per-ton-mile earnings compared with the prescribed rates and earnings here under attack. The rates on tomatoes are representative of the rates on other vegetables (Page 694, Exhibit 1):

Rates in Cents per 100 lbs. and Per-Ton-Mile Earnings in Mills

Destination	Commodity	From California		From Texas	
		Rate	PTM Rev.	Rate	PTM Rev.
Chicago, Ill.	Cabbage	149	12.8	122	18.1
	Onions	133	11.4	124	18.1
	Potatoes	125	10.7	124	18.1
	Carrots	140	12.8	124	18.1
	Tomatoes	176	15.1	124	18.1
(No reductions prescribed)					
Columbia, S. C.	Cabbage	192	13.2	118	16.8
	Onions	192	13.2	130	18.5
	Potatoes	164	11.3	124	15.6
	Carrots	192	13.2	138	19.7
	Tomatoes	217	14.9	154	22.0
(No reductions prescribed)					
Des Moines, Ia.	Cabbage	149	13.9	119	19.7
	Onions	129	12.0	119	19.7
	Potatoes	119	11.1	114	18.8
	Carrots	149	13.9	119	19.7
	Tomatoes	176	16.4	135	22.5
(No reductions prescribed)					
Detroit, Mich.	Cabbage	167	13.2	136½	17.6
	Onions	167	13.2	141	18.2
	Potatoes	138	10.9	132	17.0
	Carrots	167	13.2	154	19.9 (Pres.)
	Tomatoes	206	16.3	149	19.2 (Pres.)
(No reductions prescribed)					
Knoxville, Tenn.	Cabbage	175	12.9	113	17.8
	Onions	175	12.9	125	19.7
	Potatoes	154	11.3	121	19.1
	Carrots	175	12.9	132	20.8
	Tomatoes	211	15.5	147	23.2
(No reductions prescribed)					
New York City	Cabbage	192	11.9	151½	15.1
	Onions	192	11.9	161	16.1
	Potatoes	161	10.0	149	14.9
	Carrots	192	11.9	172	17.2 (Pres.)
	Tomatoes	217	13.5	167	16.7 (Pres.)
(No reductions prescribed)					
Pittsburgh, Pa.	Cabbage	175	12.7	139½	16.8
	Onions	175	12.7	145	17.5
	Potatoes	145	10.5	137	16.5
	Carrots	175	12.7	158½	19.1 (Pres.)
	Tomatoes	215	15.6	153	18.4 (Pres.)
(No reductions prescribed)					
Pittsburgh, Pa.	Cabbage	175	12.7	139½	16.8
	Onions	175	12.7	145	17.5
	Potatoes	145	10.5	137	16.5
	Carrots	175	12.7	158½	19.1 (Pres.)
	Tomatoes	215	15.6	153	18.4 (Pres.)

* No change prescribed where an asterisk appears.

Note: All of the above rates now subject to an increase of 15 per cent, with a maximum increase of 12 cents per 100 pounds.

To many destinations in the territory covered by the order in Exhibit 4 no reductions will result from the prescribed rates because the prescribed scales are higher than present combination rates described at Page 677 of Exhibit 1. To destinations affected by the order in Exhibit 4, the prescribed rates yield substantially higher revenue than the present rates from California which were voluntarily published over routes through the Rocky Mountains [fol. 51] over which the Commission has generally prescribed rates 15 per cent higher than within the territory east of the Rockies. See Page 678, Exhibit 1, and Fresh Green Vegetables from Idaho and Oregon, 253 I. C. C. 143, 149-150. It must be assumed that the railroads would not publish and maintain from California rates which do not yield a fair return.

Attention is directed to the fact that the per-ton-mile revenue accruing under the prescribed rates is materially higher than the per-ton-mile revenue accruing under the rates voluntarily published from Arizona and California, though the transportation from those origins involves hauls over the Rocky Mountains and desert areas where the Commission has consistently held that rates should be at least 15 per cent higher than from origins east of the Rockies. In *California RR Comm. v. A & R RR Co.*, 235 I. C. C. 511, the Commission prescribed rates on three vegetables from Phoenix, Ariz., 10 cents per 100 pounds less than from Salinas, Calif., (Page 688, Exhibit 1) but that was purely a relationship case and the rate level from Arizona and California is the result of voluntary publication by plaintiffs and their connections. It must be assumed they yield a fair return.

Page 686, Exhibit 1, shows that the present per-ton-mile revenue on various vegetables from Harlingen, Texas, to New York City range from 18.3 mills to 20.0 mills per ton mile, compared with 13.5 mills per ton mile from Salinas, Calif. The average distance from Grants, N. M., to eastern Territory Group A is 195 miles farther than from Harlingen, Texas, but the average rate is 18 cents per 100 pounds cheaper than from Harlingen. (Page 681, Exhibit 1) The rates from Grants, N. M., were voluntarily published

by plaintiffs and connections and must be assumed to yield a fair return.

Appendix B, Page 702 of Exhibit 1, shows rates on carrots from Arizona, California and Texas to eleven more destinations. No rates were prescribed to Chicago, Ill., and St. Louis, Mo. To the other nine destinations, we show below the present rates and per-ton-mile earnings from Arizona and California, compared with the present and proposed rates and earnings from Texas.

[61. 52]

Rates in Cents per 100 lbs. and Per-Ton-Mile Earnings in Mills
Present Rates Prescribed Rates

Destination	From	Rate	PTM Rev.	Rate	PTM Rev.
Boston, Mass.	Arizona	188	13.6	176	15.8
	California	198	12.0		
	Texas	186½	16.7		
Baltimore, Md.	Arizona	188	15.1	159	17.4
	California	198	12.8		
	Texas	172½	18.9		
Buffalo, N. Y.	Arizona	171	15.0	157	17.8
	California	181	12.8		
	Texas	170½	19.4		
Columbus, O.	Arizona	171	16.9	145	20.0
	California	181	12.9		
	Texas	160½	21.7		
Indianapolis, Ind:	Arizona	163	17.7	135	20.8
	California	173	14.2		
	Texas	148½	22.9		
St. Paul, Minn.	Arizona	145	16.2	144	19.6
	California	155	14.2		
	Texas	150	20.4		
Tampa, Fla.	Arizona	188	17.2	140	20.3
	California	198	13.5		
	Texas	148	21.4		
Atlanta, Ga.	Arizona	171	18.0	129	21.9
	California	181	13.4		
	Texas	133	22.6		
Birmingham, Ala.	Arizona	163	18.8	121	23.8
	California	173	13.7		
	Texas	125	24.1		

Note: All of the above rates now subject to an increase of 15 per cent, with a maximum increase of 12 cents per 100 lbs..

Exhibits 1 and 4 are part of the pleadings. For the purpose of this motion the facts stated therein are supported by substantial evidence and are binding on this Court. The Court may also take judicial notice of the Commission's decision of April 11, 1952, in Increased Freight Rates, 1951, Ex Parte 175 (not yet printed), in which it increased the

rates prescribed in Exhibit 4 by adding 15 per cent thereto, with a maximum increase of 12 cents per 100 pounds. The Commission found that the increases provided therein would yield a fair return to the plaintiffs on traffic transported [fol. 53] by them and no attack has been made on that order. Findings of fact contained in that decision are supported by substantial evidence and are also binding on this court.

The facts shown in the pleadings refute the conclusion that the prescribed rates will be less than the cost of the service and will result in taking plaintiff's property without due process of law. The voluntary rates shown on Page 3 have been in effect since 1940 and the voluntary rates from Arizona, California and New Mexico have been in effect much longer than that, except for general increases which have been made since June, 1945. This Court cannot assume that those rates are confiscatory, yet they yield substantially less revenue per ton mile than the rates here under attack.

3. No Abuse of Discretion Shown in Complaint.

Paragraph IX of the complaint states that the refusal to grant a rehearing was "arbitrary and capricious and an abuse of its discretion". That is merely a conclusion and no facts are alleged showing that the Commission was arbitrary, capricious or abused its discretion. Exhibit 4 shows that a further hearing on the existing record was granted but plaintiffs were not permitted to present additional evidence. Below we give a brief resume of the facts which plaintiffs must show if they amend Paragraph IX to correctly plead abuse of discretion.

Complaint was filed with the Commission August 24, 1948. Hearings were held in Harlingen, Texas, June 15, 1949, and in Los Angeles, Calif., June 23, 1949. The two hearings lasted four days and the abstract of facts comprises 613 pages of oral testimony and 115 rate and statistical exhibits many of which comprise as many as 50 pages 13 inches by 17 inches in size. Plaintiffs introduced considerable testimony regarding the cost of handling vegetables and they were permitted to submit all relevant testimony offered. The presiding examiner rendered a proposed

report, all parties were permitted to file exceptions thereto and the case was orally argued before the entire Commission at Washington.

The decision of the Commission was handed down December 21, 1950. Then, and not until then, did plaintiffs offer to submit the testimony as to costs referred to in Exhibit 2. [fol. 54]. And that petition was not filed until March 16, 1951. Rule 101 of the Commission's Rules of Practice provides that petitions seeking further hearing must show why such evidence was not previously adduced. The only reason given in Exhibit 2 is that such evidence was not available at the time of the prior hearings, they did not know what the prescribed basis would be (Page 12). and they could not assume that the Commission would prescribe rates below cost (Page 13). Plaintiffs knew the basis of rates proposed by the complainant and that basis was substantially less than prescribed by the Commission. The two scales are compared below.

Comparison Between Prescribed Rates and Rates Proposed by Complainant. (Rates stated in Cents per 100 lbs.)

Distance Miles	Minimum 28,000 Pounds		Minimum 20,000 Pounds	
	Prescribed	Proposed	Prescribed	Proposed
700.....	101	79	120	94
900.....	113	92	130	110
1200.....	130	112	145	129
1500.....	145	126	160	144
1800.....	158	138	173	158
2200.....	174	151	189	174

Note: All of the above rates are now subject to a 15 per cent increase with a maximum increase of 12 cents per 100 lbs. See page 678 of Ex. 1 and Page 28 of Ex. 4.

The petition shown in Exhibit 2 did not comply with the Commission's Rules of Practice because plaintiffs knew that complainant before the Commission proposed a much lower scale than the Commission finally prescribed and they could have/had their costs available for introduction at the Harlingen or Los Angeles hearings.

The Commission did not act arbitrarily or capriciously or abuse its discretion in refusing to set the case for a third hearing to receive evidence not previously offered. See *United States v. Carmack*, 329 U. S. 230, and cases

cited therein at Page 243. The Commission had examined and reported on the lower voluntary rates which plaintiffs had been maintaining for many years, reflected on Pages 3 to 5 of this memorandum. It considered the facts stated in Exhibit 2 and revised the rates prescribed in its previous decision. Cases must come to an end sometime and there was no abuse of discretion in refusing to reopen the case to receive testimony which could have been presented at prior hearings.

Plaintiffs did not make any effort to submit these cost studies until the case had been handled to conclusion and [fol. 55] decided. Then, after a period of approximately three months, they tried to obtain a further hearing. If the Commission were required to grant such applications it would become standard procedure for railroads to withhold the cost evidence until after a case is decided. Then, if adverse to them, they would ask and obtain a further hearing for the submission of evidence which, if relevant, should have been submitted at the original hearing. As previously pointed out, this is a relationship case and not a revenue case. It is doubtful whether the cost studies are relevant but, if they had been offered at the prior hearings, the presiding examiner would no doubt have received them.

The present complaint does not put in issue any facts showing arbitrary or capricious action by the Commission or abuse of discretion. Cost studies of the nature shown in Exhibit 2 are not relevant in relationship cases of this kind. Furthermore, the Commission had before it a general revenue case, Increased Freight Rates, 1951, Ex Parte 175, which has since been decided and in which the testimony described in Exhibit 2 was relevant and could have been introduced. The facts shown in Exhibits 1 and 4 and in the decision of April 11, 1952, in Ex Parte 175 show that the Commission did not abuse its discretion. There is a strong presumption in favor of the legality of administrative action in cases of this kind. Such orders cannot be set aside unless the complaint states facts showing that the Commission flagrantly violated the legal rights of par-

ties before it. There is no such allegation in this complaint.

Frank A. Leffingwell, 1515 Praetorian Building, Dallas 1, Texas:

Date: May 1, 1952.

[fol. 56] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENTION OF THE INTERSTATE COMMERCE COMMISSION—
Filed May 5, 1952

To the Honorable the Judges of said Court:

In accordance with the provisions of Section 2323, Title 28, U. S. Code, we hereby enter the appearance of the Interstate Commerce Commission as a party defendant, and of ourselves as its counsel, in the above-entitled suit.

E. M. Reidy, Chief Counsel. Charlie H. Johns, Attorney for Interstate Commerce Commission, 3315 Interstate Commerce Commission Bldg., Washington 25, D. C.

[fol. 57] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER—Filed May 2, 1952

Above cause set on trial docket for May 15, 1952.

/s/ Roy W. Harper, U. S. District Judge.

[fol. 58] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—File May 5, 1952

Now come the defendants, the United States of America and the Interstate Commerce Commission, and by their attorneys move the Court to dismiss the complaint herein on the ground that the complaint does not state a claim upon which relief may be granted for the reasons more particularly set out in the Memorandum of Points and Authorities attached hereto.

[fol. 59] H. G. Morison, Assistant Attorney General. James E. Kilday, Special Assistant to the Attorney General. George S. Robertson, United States Attorney. E. Riggs McConnell, Frank F. Vesper, Special Assistants to the Attorney General, Attorneys for the United States. Edward M. Reidy, Chief Counsel, Interstate Commerce Commission. Charlie H. Johns, Jr., Attorney, Attorneys for the Interstate Commerce Commission.

[fol. 60] MEMORANDUM OF POINTS AND AUTHORITIES

The complaint herein fails to state a cause of action upon which relief may be granted for the reasons that it appears on the face of the complaint that:

1. Plaintiffs seek to relitigate a factual question involved in the proceeding before the Commission, on which they initially elected not to present evidence.

New York v. United States, 331 U. S. 284, 334-336.

Capital Transit Co. v. United States, 338 U. S. 286, 291.

2. Plaintiff's cost figures on which they rely here were attached to their petition for rehearing before the Commission dated March 16, 1951. Since that date, increases in the rates herein under attack have been granted by the Commission (Order dated April 11, 1952 in Ex Parte 175, *Increased Freight Rates 1951*). Plaintiffs have not at-

tempted to present to the Commission the effect that such increases have on the compensatory nature of the rates herein attacked.

New York v. United States, 331 U. S. 284, 334-336.

Capital Transit Co. v. United States, 338 U. S. 286, 291.

3. The complaint alleges that the rates fixed by the Commission deprive the numerous plaintiffs, as a group, of property without due process of law.

Aetna Insurance Co. v. Hyde, 275 U. S. 440.

Townsend v. Yeomans, 301 U. S. 441.

Missouri Rate Cases, 230 U. S. 454.

4. In so far as the complaint attempts to allege a case of deprivation of property without due process of law as to individual carriers, the allegations are insufficient.

[fols. 61-62] *Public Service Commission of Montana v. Great Northern Utilities Co.*, 289 U. S. 130.

Louisville & Nashville R. Co. v. Garrett, 231 U. S. 298

See:

Alabama Public Service Commission v. Southern Railway Co., 341 U. S. 341.

• *Northern Pacific Railway v. North Dakota*, 236 U. S. 585, 597, 599.

5. In so far as the complaint attempts to allege a case of deprivation of property without due process of law because the Commission fixed unreasonably low rates on a single group of commodities, the allegations are insufficient.

Alabama Public Service Commission v. Southern Railway Co., 341 U. S. 341;

Northern Pacific Railway v. North Dakota, 236 U. S. 585, 597, 599.

Atlantic Coast Line R. Co. v. North Carolina Corporation Commission, 206 U. S. 1, 24-27.

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO STAY AND REMAND—Filed May 6, 1952

Plaintiffs in the above entitled proceeding, move the Court as follows:

1. To stay this cause, but with jurisdiction retained in the Court, pending an administrative determination by the Interstate Commerce Commission of the costs of transporting vegetables as described in paragraphs VI and VII of the complaint.

2. To remand this cause to the Interstate Commerce Commission for the sole purpose of an administrative determination by said Commission of the costs of transporting vegetables as described in paragraphs VI and VII of the complaint.

[fol. 64] Oral argument is requested.

Respectfully submitted, Robert H. Bierma, H. D. Boynton, T. O. Broker, J. P. Canny, Richmond C. Coburn, Frank H. Cole, Jr., L. P. Day, R. B. Elster, R. J. Fletcher, James B. Gray, Toll R. Ware, Attorneys for Plaintiffs.

652 Union Station,
Chicago 6, Illinois.

Certificate of Service

I certify that I have today served the foregoing motion, with affidavit attached thereto and the brief of plaintiffs in support of said motion, by mailing a copy to

Frank F. Vesper, Department of Justice, Washington, D. C.

E. M. Reidy, Assistant Chief Counsel, Interstate Commerce Commission, Washington 25, D. C.

C. Riggs McConnell, Department of Justice, Washington, D. C.

Frank A. Leffingwell, c/o Leffingwell & Oehmann, 1515
Praetorian Building, Dallas 1, Texas

by Air Mail.

Chicago, Illinois, May 6, 1952.

[fol. 65]

Notice of Motion

To Messrs. Frank F. Vesper, Department of Justice, Washington, D. C. C. Riggs McConnell, Department of Justice, Washington, D. C. E. M. Reidy, Assistant Chief Counsel, Interstate Commerce Commission, Washington 25, D. C. Frank A. Leffingwell, c/o Leffingwell & Oehmann, 1515 Praetorian Building, Dallas 1, Texas.

Gentlemen:

Please take notice that the undersigned will bring the above motion on for hearing before this Court at St. Louis, Mo., on the 15th day of May, 1952, at 10:00 o'clock the forenoon of that day or as soon thereafter as counsel can be heard.

Robert H. Bierma, Attorney for Plaintiffs.

Date: May 6, 1952.

652 Union Station,
Chicago 6, Illinois.

[fol. 66] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF J. L. HEYWOOD

J. L. Heywood, being duly sworn, deposes and says:

I reside at 6050 Overbrook Ave., Philadelphia, Pa. and have an office in the City of Philadelphia, Pa.

1. I have been engaged in railroad cost and accounting work for over a period of 37 years. I am an officer of The Pennsylvania Railroad Company, one of the plaintiffs in the above entitled proceeding. My present title is that of Assistant Comptroller. As part of my duties with the

Pennsylvania I have prepared numerous cost studies which show the cost of transporting various commodities by railroad between points in the United States. These studies have been utilized by the Pennsylvania and other railroads in the United States as a basis for the publication of freight rates and also in numerous proceedings before the Inter-[fol. 67] state Commerce Commission in which the railroads were defending or proposing a certain level of rates to be applicable on various commodities. I have appeared before the Interstate Commerce Commission as the chief cost analyst for the Pennsylvania and other railroads in numerous proceedings including *Furniture, L. C. L. From, To and Between the East*, 279 I. C. C. 509 (1950); *Class Rate Investigation*, 262 I. C. C. 447 (1945); and *Railway Mail Pay*, 283 I. C. C. 503 (Docket No. 9200) (1951). Necessarily, as part of my duties, I have had to familiarize myself with railroad cost formulas promulgated and used by the Bureau of Accounts and Cost Finding Section of the Interstate Commerce Commission and other governmental bodies.

2. Since the issuance of the first decision of the Interstate Commerce Commission in *Texas Citrus and Vegetable Growers and Shippers*, Docket 30074, on December 21, 1950, it has been my duty, in collaboration with cost analysts of other railroads, parties to said order, to prepare studies to demonstrate the costs of transporting vegetables from Texas as described in paragraphs VI and VII of the complaint filed in this proceeding with which I am familiar. These studies, those made individually by me, or under my direction and supervision, or made by other cost analysts, with which studies I am also familiar, have been in the course of preparation since the issuance of the Interstate Commerce Commission's order of December 21, 1950. Like studies have been made since the issuance of the order of the Interstate Commerce Commission on January 7, 1952. These studies, now almost in their final stage will show in detail and with summary sheets, the costs of transporting vegetables from Texas as described in paragraphs VI and VII of the complaint filed in this proceeding. These studies will be completed in the very near future.

3. The cost studies which have been described in para-

graph 2 herein are extremely voluminous. These studies cover so-called gathering costs at origin, line-haul costs, various switching costs, etc. Literally thousands of individual calculations are made in the preparation of the [fols. 68-69] cost studies described in paragraph 2 herein. The studies follow accepted formulas, developed by railroad cost analysts, cost analysts of the Bureau of Accounts and Cost Finding Section of the Interstate Commerce Commission, and cost analysts of other governmental bodies and other interested organizations. All available statistics governing railroad transportation have been utilized. The complexity of the task in the ascertainment of railroad costs is illustrated by the discussion of evidence of this nature in the report of the Interstate Commerce Commission in *Class Rate Investigation, 1939*, 262 I. C. C. 147 at pages 571-592. This evidence is also reviewed in *New York v. United States*, 331 U. S. 284 at pages 315-330. I participated in the prior proceeding as shown in paragraph 1 herein. It is generally admitted that the ascertainment of railroad costs is a complicated process involving both factors of judgment and precise application of available statistics. Railroad cost analysts, like myself are generally specialists in the field. The same situation is true of the Interstate Commerce Commission which maintains a specialized Bureau of Accounts and Cost Finding Section. Evaluation of such cost data has also been generally made by governmental organizations such as the Interstate Commerce Commission, which organization is staffed with specialists in the field of railroad cost accounting.

J. L. Heywood.

Subscribed and sworn to before me this — day of —
1952. — — —, Notary Public.

[Title omitted]

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO STAY AND
REMAND

Statement of the Case

A: The Complaint

The complaint filed in this cause seeks the entry of an order enjoining, setting aside, annulling, and suspending an order of the Interstate Commerce Commission in a proceeding entitled *Texas Citrus and Vegetable Growers and Shippers v. Atchison, Topeka & Santa Fe Railway Company et al.*, No. 30074, on the Commission's docket. In said proceeding, by an order dated January 7, 1952, the Commission ordered the establishment of a new reduced basis of rates on vegetables from Texas as described in paragraph VI and VII of the complaint.

Subsequent to the issuance of this order and a prior order [fol. 71] dated December 21, 1950, which latter order was simply clarified in the order of January 7, 1952, plaintiffs filed two petitions for rehearing with the Commission seeking the opportunity to present evidence which would demonstrate that this prescribed basis of vegetable rates, if made effective, would yield to the carriers affected by the order revenues less than the costs of providing the service covered by said rates. It was alleged in said petitions that said rates were confiscatory, and would deprive these carriers, including plaintiffs, of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States of America. Said petitions were denied by orders of the Commission (complaint ex. nos. 2-3, and 5-6). Said order of January 7, 1952 by its terms is presently to become effective August 1, 1952 upon 30 days notice to the public.

Plaintiffs seek from this Court the opportunity to present evidence which will show that the costs of providing the service covered by the rates prescribed in the order of January 7, 1952 are greater than the revenues which would

be produced by said rates. Plaintiffs, after such a hearing, seek the entry of an order from the Court enjoining the enforcement of the order of the Commission.

B; Plaintiffs' Motion To Stay And Remand
Plaintiffs now seek an order from the Court:

1. To stay this cause, but with jurisdiction retained in the Court, pending an administrative determination by the Interstate Commerce Commission of the costs of transporting vegetables as described in paragraphs VI and VII of the complaint.

2. To remand this cause to the Interstate Commerce Commission for the sole purpose of an administrative determination by said Commission of the costs of transporting vegetables as described in paragraphs VI and VII of the complaint.

Points Relied Upon By Plaintiffs

1. The Court has jurisdiction of this cause.

62 Stat. 931, 936, 968, 970, 63 Stat. 105; 28 U. S. C.

§§ 1336, 1398, 2284, 2321-2325;

Baltimore & O. R. Co. v. United States, 298 U. S. 349;

New York v. United States, 331 U. S. 284.

[fol. 72] 2. Plaintiffs have a right to a trial de novo at which time, evidence can be adduced to support their allegation that confiscation in violation of their constitutional rights will result should the Commission's order of January 7, 1952 become effective.

Complaint, paragraph VII.

Baltimore & O. R. Co. v. United States, 298 U. S. 349, 370-372;

New York v. United States, 331 U. S. 284, 335-336;

Pittsburgh S. S. Co. v. Brown, 171 F. (2d) 175, 177;

Lang Transp. Corporation v. United States, 75 F. Supp. 915, 922.

3. The ascertainment and appraisal of railroad costs of transporting vegetables from Texas as described in paragraph VI and VII of the complaint is a complicated proc-

ess involving both factors of judgment and precise application of available statistics and one best suited to an expert administrative body such as the Interstate Commerce Commission.

Affidavit of J. L. Heywood here attached.

New York v. United States, 331 U. S. 284, 328.

4. When it appears in the course of litigation that an administrative problem, suited to the expert judgment of the Interstate Commerce Commission is involved, the Court should stay its hand retaining jurisdiction of the cause, but remand the administrative problem to said Commission for its determination.

General American Tank Car Corporation v. El Dorado Terminal Co., 308 U. S. 422, 432;

Addison v. Holly Hill Co., 322 U. S. 607, 621;

Thompson v. Texas Mexican R. Co., 328 U. S. 134, 147;

New York v. United States, 331 U. S. 284, 334.

Argument

The Court has jurisdiction of this cause under special statutory proceedings, this being an action to enjoin an order of the Interstate Commerce Commission. 62 Stat. 931, 936, 968-970, 63 Stat. 105; 28 U. S. C. §§ 1336, 1398, 2284, 2321-2325. See in this connection also *Baltimore & O. R. Co. v. United States*, 298 U. S. 349, and *New York v. United States*, 331 U. S. 284, where the Court took jurisdiction of actions in which confiscation in violation of constitutional rights was expressly claimed.

[fol. 73] Plaintiffs further have a right to a trial de novo, aside and apart from the record before the Commission, at which time evidence can be adduced to support their allegation of a violation of constitutional rights should the assailed order of the Commission become effective. In two petitions for rehearing, filed with the Commission, plaintiffs sought the opportunity to present evidence in support of their claim of confiscation (complaint ex. nos. 2 and 5). These petitions were denied (Complaint ex. nos. 3 and 6). Plaintiffs are entitled to a hearing at which time they can

introduce evidence to protect their constitutional rights. Plaintiffs seasonably raised their claim of confiscation before the Commission by their two petitions for rehearing. This same situation was dealt with by the Supreme Court in *Baltimore & O. R. Co. v. United States*, 298 U. S. 349, 370 where this was stated:

They could not foresee that confiscatory restitution would be required or that confiscatory divisions would be prescribed; they were not bound, in advance of the commission's findings and report, to set up a fear of transgression of their constitutional rights. Presumably the commission would keep within the law.

As shown also in this same case at pages 362-364 and 368-369, plaintiffs are entitled as a matter of right to a hearing on their claim of confiscation:

At the trial the United States and commission moved that no evidence be received other than that contained in the record before the commission. The court denied the motion. Counsel for the United States and commission do not here claim that the ruling was erroneous. But it has been suggested that the trial court should not have received evidence other than that introduced before the commission; that it was not permitted to make findings but was bound to accept those of the commission if supported by evidence. Decisions in lower federal courts touching the points thus raised are not harmonious. Their determination has an important bearing upon the decision here to be made. It is therefore necessary to decide what, in respect of admission and consideration of evidence, should have been the scope of the trial in the district court.

There is no statute that can be held to limit as suggested trial of an issue of confiscation. No question as to compensation in the constitutional sense was raised [fol. 74] by the complaints to the commission. The issues there concerned only the fairness of divisions. Prior to the taking effect of the order, appellants filed a petition for rehearing in which they claimed that its enforcement would confiscate their property; they then

made substantially the same contentions as they make in this suit and sought opportunity to support them by evidence in order to obtain the commission's findings of fact and decision upon the question of confiscation. But the commission denied their application. That denial of hearing amounted to a command of the commission that, notwithstanding their petition to it invoking constitutional protection, appellants must make the specified adjustment involving the payment of enormous sums and use their property to serve the public for the compensation specified in the order. As the carriers' application to the commission for just, reasonable and equitable divisions under § 15 (6) raised no question of confiscation, its findings in the report may not be construed as addressed to that issue.

There is a wide and fundamental difference between the question whether the commission, in prescribing division found by it to be just, reasonable and equitable, complied with the procedural requirements of the Act, and whether, if enforced against objecting carriers, the order will confiscate their property. The commission's findings of fact in the field first mentioned, if based on evidence, are conclusive. But, upon the question whether prescribed divisions constitute just compensation within the meaning of the Fifth Amendment, Congress is without power conclusively to bind the carriers. As the Congress itself could not be, so it cannot make its agents be, the final judge of its own power under the Constitution. Congress has no power to make final determination of just compensation or to prescribe what constitutes due process of law for its ascertainment.

The just compensation clause may not be evaded or impaired by any form of legislation. Against the objection of the owner of private property taken for public use, the Congress may not directly or through any legislative agency finally determine the amount that is safeguarded to him by that clause. If as to the value of his property the owner accepts legislative or administrative determinations or challenges them merely

upon the ground that they were not made in accordance with statutes governing a subordinate agency, no constitutional question arises. But, when he appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount. The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it.

Baltimore & O. R. Co. v. United States, 298 U. S. 349, was expressly approved by the Supreme Court in *New York v. United States*, 331 U. S. 284, 334. See also *Pittsburgh S. S. Co. v. Brown*, 171 F. (2d) 175, 175 in which the United States Court of Appeals for the Seventh Circuit remanded an action to the district court for a trial de novo or a constitutional jurisdictional issue. In *Lang Transp. Corp. v. United States*, 75 F. Supp. 915, 922, the district court in its opinion dealing with an order of the Interstate Commerce Commission which was under attack, expressly stated that a trial de novo in the district court is proper when "a claim of confiscation is made in a rate case" if the evidence had been submitted in the first instance to the Commission. Express reliance was placed, among others, upon *Baltimore & O. R. Co. v. United States*, 298 U. S. 349. Plaintiffs did submit their evidence to the Commission in the first instance. Their two petitions for rehearing were denied by the Commission. Plaintiffs are entitled to a hearing, a trial de novo, on their claim of confiscation.

The problem presented is next the manner in which this evidence can best be presented. As the affidavit of J. L. Heywood indicates, railroad cost accounting is a technical science based on matters of expert judgment and precise application of statistics. Railroad cost accounting has been characterized by the Supreme Court in *New York v. United States*, 331 U. S. 284, 328, in the following language:

We start, of course, from the premise that on a subject of transportation economics, such as this one, the Commission's judgment is entitled to great weight. The appraisal of cost figures is itself a task for ex-

perts, since these costs involve many estimates and assumptions and, unlike a problem in calculus, cannot be proved right or wrong. They are, indeed, only guides to judgment. Their weight and significance require expert appraisal.

So characterized, it seems clear that the evidence which plaintiffs will offer in support of their allegation of con-[fol. 76] fiscation is voluminous, and of a technical complexity that might unnecessarily burden this Court.

For this reason, plaintiffs have filed this motion for the Court to stay its hand, retaining jurisdiction thereof, but remanding the administrative issue of a determination of costs for the transportation of the involved traffic to the Interstate Commerce Commission. While it is true that in *Baltimore & O. R. Co. v. United States*, and *New York v. United States*, 331 U. S. 284, the district courts did hear the cost evidence, the trend of recent decisions has been to follow the course here suggested in plaintiffs' motion.

Such a course was followed in *General Amer. T. Car Corp. v. El Dorado Term. Co.*, 308 U. S. 422, 433 where the following was stated:

When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal, but, as in *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, 230 U. S. 247, 57 L. ed. 1472, 33 S. Ct. 916, *supra*, the cause should be held pending the conclusion of an appropriate administrative proceeding. Thus any defenses the petitioner may have will be saved to it.

The judgment of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court for further proceedings in conformity to this opinion.

See also *Addison v. Holly Hill Co.*, 322 U. S. 607, 621; and *Thompson v. Texas Mexican R. Co.*, 328 U. S. 134, 147. Special mention should be made again of *New York v.*

United States, 331 U. S. 284, 334, where this was stated with regard to the method of determination of cost evidence in a case of alleged confiscation:

Thus we think that if the additional evidence was necessary to pass on the issue of confiscation, the cause should have been remanded to the Commission for a further preliminary appraisal of the facts which bear on that question.

It would seem that this later course is one most satisfactory to all. The Court, it is true, has complete jurisdiction to hear the cost evidence to be proffered. But in the [fol. 77] time that it would take to present such evidence with its technical ramifications, it would seem to place an undue burden upon the business of the Court. Especially is this true when the facilities of the Interstate Commerce Commission are so readily available. Hence both practicality and precedent are in support of this motion to stay and remand.

Conclusion

The Court has jurisdiction of this cause. Plaintiffs are entitled to a hearing at which evidence can be adduced in support of their allegation of confiscation. Orderly handling of this cause would dictate that the Court now stay its hand, retaining jurisdiction of this cause, but remanding the proceeding to the Interstate Commerce Commission for an administrative determination of the costs of transportation of the involved traffic.

Respectfully submitted, Robert H. Bierma, H. D. Boynton, T. O. Broker, J. P. Canny, Richmond C. Coburn, Frank H. Cole, Jr., L. P. Day, R. B. Elster, R. J. Fletcher, James B. Gray, Toll R. Ware, Attorneys for Plaintiffs.

[fol. 78] IN UNITED STATES DISTRICT COURT

[Title omitted]

Transcript of Proceedings on Defendant's and Interstate Commerce Commission's Motions to Dismiss; Texas Citrus & Vegetable Growers and Shippers' Motion to Dismiss; and Plaintiffs' Motion to Stay and Remand—Filed July 28, 1952

Be it remembered, That on Thursday, May 15, 1952, at ten o'clock a. m., the above entitled motions in the above entitled cause were argued before a three-judge court composed of Hon. Seth Thomas, United States Circuit Judge, Hon. George H. Moore, and Hon. Roy W. Harper, United States District Judges.

APPEARANCES:

The plaintiffs were represented by Messrs. Richmond C. Coburn, James B. Gray, Robert H. Bierma and Toll R. Ware.

The defendant was represented by Messrs. Wm. V. O'Donnell and Frank F. Vesper.

The Intervenor, Interstate Commerce Commission, was represented by Mr. Leo H. Pou.

The Intervenor, Texas Citrus & Vegetable Growers and Shippers, was represented by Messrs. R. W. LaTourette [fol. 79] and Frank A. Leffingwell.

Whereupon, the following proceedings were had and entered of record:

COLLOQUY BETWEEN COURT AND COUNSEL

Judge Thomas: The matter for hearing this morning is the case of the B. & O. Railroad Company vs. United States of America. As I understand it, there are some motions to be heard this morning.

Mr. Coburn: If the court please, may I rise to present a purely formal matter before the court in accordance with appearance of counsel here this morning before you take up these motions?

It is my pleasure to introduce to the court Mr. James B. Gray of New York, who is a member of the Illinois and New York Bar, and also the Eastern and Northern Districts of Illinois, who is counsel of record for the plaintiffs in the case, and also Mr. Robert H. Bierma of Chicago, Illinois, who is a member of the Illinois Bar, and also a member of the Bar of the Northern District of Illinois, who is also an attorney of record for the plaintiffs in this case.

Mr. O'Donnell: If the Court please, I would like to introduce Frank F. Vesper. He is a special assistant attorney general. He will represent the government in this matter.

If the court will indulge me, I would like to present Mr. Pou, who I believe the court knows, Mr. Leo Pugh of the counsel for the Interstate Commerce Commission. Both of [fol. 80] these attorneys will be attorneys of record in this matter.

Mr. Pou: While I am on my feet, may I enter my appearance which I have not previously entered by filing the usual form with the clerk?

Mr. LaTourette: If your Honors please, it is my pleasure to introduce to this court Mr. Frank A. Leffingwell, a member of the Bar of the City of Dallas. Mr. Leffingwell appears in this proceeding in behalf of the Texas Citrus & Vegetable Growers and Shippers, intervenors. Mr. Leffingwell.

Mr. Leffingwell: I believe, your Honor, there is an intervening petition on behalf of that corporation, which probably has not yet been granted. We submit that now.

Judge Thomas: Your order will be signed then.

Mr. Leffingwell: Thank you.

Judge Thomas: Have you any suggestions as to which of these matters should be presented first?

Mr. Gray: If the Court please, there are two motions to dismiss, one filed jointly by the United States and the Interstate Commerce Commission, and one filed by the Texas Citrus & Vegetable Growers and Shippers.

There is also a motion to stay and remand filed by the plaintiffs.

I suggest for the court's consideration the arguments for the motions to dismiss go first by both parties, then the plaintiffs reply to those motions, plaintiffs also then argue

[fol. 81] in favor of their motion to stay and remand with reply on the other parties and rebuttal in the last instance on plaintiff, if necessary.

Judge Thomas: If that satisfactory?

Mr. Vesper: Yes.

Judge Thomas: All right, you may proceed, then.

Mr. Vesper: As stated, the government has filed a motion to dismiss this case on the ground the complaint fails to state a cause of action, or rather a claim upon which relief may be granted.

The grounds specified were the following:

Whether the plaintiffs have timely raised the question of confiscation before the Commission; (2) Whether they may maintain this action without first submitting to the Commission the effect that such increases have on the compensatory nature of the rates herein attacked; (3) Whether plaintiff may maintain its action based upon an allegation that the rate prescribed deprive them as a group and a class of property without due process of law; (4) Whether the complaint sufficiently alleges deprivation of property without due process of law as to said carrier; and (5) Whether the complaint sufficiently alleges deprivation of property without due process of law because the Commission fixed unreasonably low rates on an individual group of commodities.

Now, we have submitted briefs on this matter, and I [fol. 82] think I will devote my argument merely to clearing up and expanding on a few points we have raised that may need clarification.

Our first basis in support of our motion, that the cannot properly submit the question of confiscation to the Commission, it is based upon the premise that the standard of the Interstate Commerce Commission as to just and reasonable rates is also the constitutional standard, and I think it might be well if I go into the history of the matter of just and reasonable rates.

As said in *Texas and Pacific Railroad Company vs. Abilene Cotton Oil Company*, in 204 U. S. 426, prior to legislative action, the matter of just and reasonable rates was a common law issue handled by the courts. They would hear the complaint of the party, that he had been subjected to

unreasonable rates on the part of a carrier, and would judge that on the evidence presented.

So, as common law was the basic premise of our, you might say of our legal structure, it seems clear that when the Interstate Commerce Act adopted that as its standard, they were adopting the very, you might say, essence of due process of law, because that was a standard recognized as common law.

The Interstate Commerce Act, as I say, adopted this standard growing out of the common law procedure. From that, it seems clear that the statutory basis for the determination of just and reasonable rates is coextensive with the constitutional requirement as held in the Hope Natural [fol. 83] Gas Case, 320 U. S. 591-607.

Judge Thomas: These citations are in your brief, are they?

Mr. Vesper: The citation of the Abilene Cotton Oil Case was not in the brief. I just added that as more background material.

Now, in our brief, we point out that the cost of service is an important factor in the determination of just and reasonable rates, and the cases which we cite, I believe, show that those standards as developed under the Interstate Commerce Act were the standards that applied to common law.

Now, it is true from the time of the adoption of the Fourteenth Amendment to the time of the adoption of the state regulatory act, there had probably not been a sufficient opportunity to test in the common law action whether there was a deprivation of the property without due process of law when the court established just and reasonable rates, but I am aware of no case where that issue was raised.

Now, as stated, the cost of service is an issue and has always been an issue, basic issue in the determination of a just and reasonable rate, and we point out the carriers recognize this factor in this case and did introduce some cost evidence. They discussed the fact that there was special cost in handling vegetables from Texas due to the necessity of moving refrigerator car. They also introduced evidence of their loss and damage claims, which is important. The Commission found, however, there was no

evidence that these costs were peculiar to the vegetable traffic from Texas and that it was not applicable to vegetable traffic from other points for which plaintiffs maintain lower rates.

Based upon that background we do not believe that the carriers can insist that that was not—the cost of service was not an issue in the original proceeding before the Commission. They did not present their whole case at that time. Maybe, as they say, the particular evidence which they seek to introduce was not in that form known to them, particularly to counsel. However, the carriers do have, I think it should be recognized that they do have accounting departments that do know the costs and so the plaintiffs must have some idea of what their cost of handling traffic is.

They, however, on petition for reconsideration, did raise the question that the rates fixed by the Commission were not sufficient to cover costs. However, they state that they did not know what rate the Commission would prescribe. However, the complainant, in the hearing before the Commission, put out the basis of the rates sought and they clearly had some indication there that those, in their opinion, they could have made up their mind as to whether those were unjust and unreasonable.

They argue in their brief that since they ask for maximum reasonable rates, that instead of minimum reasonable [fol. 85] rates, and there is a zone of reasonableness, that that makes some difference, but it seems obvious that that cannot be so, because if a rate is too low as a maximum, it must also be too low as a minimum, in either event.

Now, the plaintiffs in this case rely very heavily on *Baltimore and Ohio Railroad vs. United States*, 298 U. S. 349. That case involved divisions of rates. I think that perhaps this court is—from this District and the Court of Appeals in this District, is familiar with the question of divisions, having had before them *Baltimore and Ohio Railroad vs. Thompson*, 80 Federal Supplement, 570, affirmed, 180 Federal (2d) 416. From that they know that there was no basis of common law for the determination of just and reasonable divisions. It was purely a matter of contract among the parties, and that when Congress enacted

legislation providing for just and reasonable divisions, they put in standards, you might say, for the first time for determining fair and reasonable division. Those standards are based upon the matter of returning to the carriers as near as possible operating costs, plus a fair return on the fair value of the property invested.

There are several other standards in the act, that is the 15-(3) of the Interstate Commerce Act, which, however, as pointed out in the Baltimore and Ohio Case, are merely subdivisions of the question of a fair return. In other words, as [fol. 86] the court pointed out in the Baltimore and Ohio Case, the question of the efficiency of the carriers, that enters into whether you should allow full operating costs or not in determining the fair and just division, and whether the carrier is the originating or the terminating carrier, or an intermediate carrier. Those are all factors in determining the coverage of operating expenses, so in the division case, the problem was clearly one of whether the statutory standard and the constitutional standard, was merely whether it would have a fair return, but as we point out, that is not the case in the matter of just and reasonable rates on a single commodity, that the factor of cost of service is not the controlling factor even from a constitutional standpoint.

From that I think it is clear that the carriers did not exercise fully their opportunity to present this matter at the proper time to the Commission. They waited until after hearing, after a proposed report. They filed exceptions to the examiner's proposed report. That is of record in this case. And they did not raise the constitutional issue at that time, even though the examiner had recommended lower rates than the current existing rates and which, if their cost figures are accurate which they present in this case, shows that the current rates are non-compensatory also.

Our second point was that the case was affected by the fact that the Commission has granted an increase in rates on all rates and that that increased revenue will have [fol. 87] some effect upon the compensatory nature of these rates. After all, the rate reduction from the samples

shown in the exhibit attached to the complaint herein show that the rates were reduced only about two to three per cent, that the revenue was reduced about two to three per cent. The Commission's increase was fifteen per cent, subject to a 12-cent maximum, which could range, at least, possibly six per cent on most of these rates. They did not present that to the Commission.

Now, the carriers say, well, they could not do that. This complaint was filed before the blanket increase was put into effect. That, of course, is true. However, we are dealing here with the question of confiscation, and we are dealing some with the point that this case has become moot with the filing of the increases applicable to these rates, that after all the rates under attack will not and are not now the rates being charged—well, they would not be because even if they had gone into effect without the court continuance, the court and commission giving a stay, but the rates, if they became effective would not be the rates which they are attacking and which their revenue figures are computed on. That intervening acts over which the parties may not have full control may render a case moot I think is fully established by the *United States vs. Hamburg-American Company*, 239 U. S. 467. That is not covered in our brief.

[fol. 88] Furthermore, there is another factor that I want to point out in confiscation cases—the granddaddy of them all, you might say, is *Smyth vs. Ames*, 197 U. S. 547. The court in that case was discussing the question of the effect upon changed conditions, upon a rate which the Supreme Court and the District Court had held to be confiscatory. The court said, "But it may be added that the conditions of business, so far as railroad corporations are concerned, have probably changed for the better since the decree below, and that the rates prescribed by the statute of 1893 may now afford all the compensation to which the railroad companies in Nebraska are entitled as between them and the public. In anticipation, perhaps, of such a change of circumstance, and the exceptional character of the litigation, the Circuit Court wisely provided in its final decree that the defendants, members of the Board of Transportation, might, when the circumstances have changed, so

that the rate fixed in said act of 1893 shall yield to said companies' reasonable compensation for the services aforesaid, apply to the court for a further order in their behalf. Of this provision of the final decree, the State Board of Transportation, if so advised, can avail itself. In that event, if the Circuit Court finds that the present condition of business is such as to amend the application of the statutes to the railroad company in question without depriving them of just compensation, it will be its duty to discharge the injunction heretofore granted and to make what [fol. 89] ever is necessary to remove any obstruction placed by the decree in these cases in the way of the enforcement of the statute."

I think that case clearly points up that the question, the complaint, in a confiscation case is not the controlling factor. The changing conditions must always be taken into account in determining whether the rates are confiscatory.

Here in this case there has been considerable change in the rates under attack, and we think that that renders the case moot. We also say at the very least, however, if evidence should be heard, this should be remanded to the Commission for consideration of that point.

Our third point is that this action alleges that the rate deprives the numerous plaintiffs as a group of property without due process of law, and that such a case may not be maintained.

I want to point out on this point merely that the parties have filed this case not only as a group but as a class, representing parties who are not present before the court, and to whom, as we point out, and they concede "the rates must be respective or compensatory and must be decided on an individual basis."

We did not raise this point so much as a matter of dismissal, although it is in our motion to dismiss, but more of a matter of eliminating—it was more, I think, in the nature of a motion to strike, to define the issues more [fol. 90] clearly, as to what should be before the court.

"The allegations of the complaint are insufficient to allege the deprivation of property without due process of law as to individual carriers." Now, this is also wrapped up with the fifth—they are really interrelated points—that

it is insufficient to allege deprivation of property resulting from a single commodity if they have not alleged it of a single commodity, they have not covered it as to individual carriers either.

The plaintiffs point out that, of course, under the federal rules they merely need to state a claim in ultimate fact and we concede that. If they had merely come in and said that the rate prescribed was confiscatory that would have stated a claim, but plaintiffs did more than that, not only in their complaint, to which they attach numerous exhibits, and in their briefs filed herein they raise the point that their sole basis of attack—their sole reason that these rates are confiscatory are that they do not cover costs.

They have gone beyond what was necessary and they show that if they prove everything that they intend to prove from our standpoint they have not stated a claim upon which relief can be granted, because that is not sufficient. The mere fact that the rate is not compensatory is not the sole determining factor.

[fol. 91] In the Northern Pacific Railroad Company vs. North Dakota, there individual rates were involved on a particular commodity, but the government—and held that the governmental unit wanted to favor the transportation of that commodity by fixing the rate at below normal, however, at the trial of the case, the governmental unit involved attempted to justify the rates solely on the basis of cost and the Supreme Court said that if you are justifying these rates on cost, all costs must be considered, but then they said it does not appear that there has been any practice of the carriers in North Dakota which affords any semblance of support for a rate so low, and, furthermore, they further stated but a different question arises when the state has segregated a commodity or a class of traffic and it has attempted to compel the carrier to transport it at a loss without substantial compensation, even though the entire traffic to which the rate is applied is taken into account. On that fact being satisfactorily established, the presumption of reasonableness is rebutted. If in such a case there exists any practice or what may be taken to be broadly speaking a standard of rate with respect to that traffic,

in the light of which it is insisted that the rates should still be regarded as reasonable, that should be made to appear.

Now, in their complaint plaintiffs make that to appear. They have put in the report of the commission, which base their adjustment of rates mainly on comparison with the rates on vegetables from other comparable points. That [fol. 92] is a part of the pleadings in this case and the report of the commission shows that the carriers themselves did not insist that that was not supported by the record, that that was not a finding of the record at the time made, so that plaintiffs' own petition here shows that other facts do exist, which justify or can justify a finding that costs are not the only factors in this case.

I believe that in the discussion in the brief other cases indicate that cost is not the sole determining factor. We have covered that sufficiently in the brief.

I do want to point out one thing, that the exhibits which the complaint herein shows were submitted to the Commission, the petition for reconsideration was based solely on a part of the traffic which they said was substantial, but which from the Commission report shows is a—well, it's not over 50 per cent of the total traffic involved in the rates prescribed herein, and I want to point out the North Dakota case definitely said that the showing on the rates must be whether they are compensatory on all the traffic involved in the rate study, and since in their petition for reconsideration they presented only a study of part of the traffic, I think that would be alone sufficient justification for the commission to entertain refusal of reconsideration, of the petition for reconsideration.

Judge Harper: Might I ask you, did I understand you to [fol. 93] say or did I get the impression wrong that if this matter is not dismissed, it is your opinion it should go back to the Commission?

Mr. Vesper: Yes, I would agree on that. We stand on our petition to dismiss, however, but we concur in the agreement. However, on the motion to remand, if you would like me to comment at this time—

Judge Harper: No, I just wanted to get your position. I thought that was what you said and I wanted to be sure.

Mr. Leffingwell: If your Honor please, I am speaking

for the Texas Shippers, who filed this complaint with the Interstate Commerce Commission in support of the motion to dismiss by the government, and in support, also, of a similar motion by ourselves.

I think I should call attention, briefly, to what the case is all about, what brought it, and what the case amounted to, and if I may, I would like to place before your Honors a map which illustrates this. I have a copy for the plaintiffs and a copy for the government.

This case involved a complaint attacking the rates on all vegetables from the State of Texas to all points in the United States outside of Texas. The resulting decision was very disappointing to us. We know it seems to have been disappointing to the railroads, but what the commission did was to give us no relief whatever on cabbage, onions and potatoes, and that represents 36 per cent of our production, [fol. 94] and on vegetables—other vegetables, they gave us—they prescribed maximum rates to the green territory destination shown on this map, but to many of those points in that territory, those maximum rates which they prescribed were higher than the present rates which the carriers were voluntarily carrying to those destinations.

Now, as to carrots, the destination territory was considerably larger. Carrots represent seven per cent of our movement.

By the way, the production and shipments of vegetables in 1947 from Texas was approximately 55,000 carloads. From Arizona and California, the rates which we were complaining about, they ship about three times that much vegetables per annum.

With that little background, I want to support what Mr. Vesper has said in all respects except with regard to the motion to remand. We are afraid that if this case is remanded to the Commission, it will require another year and that will postpone the effective date of this order for another year, even if we won out and the Commission sustains this order, and because of the fact that these vegetables are sold on a competing market. There is no way that I know of in which this court can protect the shippers in Texas from damages that will occur during the year's delay in getting a final decision from the Commission, be-

cause it isn't so much the freight charges that they are going through but it is the sale of the vegetables that they [fol. 95] lose unless we can get these rates competitive.

I think it is well understood, and probably each of you gentlemen will agree immediately that these decisions of the Interstate Commerce Commission are final and cannot be overturned by the courts unless you can show one of four things:

If it is shown that the decision or the findings of fact are not supported by evidence, if you show that there was lack of adequate hearing, or if it is shown that the order exceeds the constitutional limits, or the constitutional powers of the Commission, or if the Commission abused its discretion.

Now, the first two, there is no allegation here about that at all. It is admitted for the purpose of this argument that all the facts stated in the order are supported by evidence and it is admitted that they had adequate hearings. They had two hearings, and they lasted four days, so there is no question about an adequate hearing, but they do say that the order takes their property without due process of law and the reason they say that it takes it without due process of law is because the Commission refused to grant them a further hearing.

In their reply to our motion they make this statement on page 5 of their memorandum: "The gravamen of plaintiffs' cause is that plaintiffs have not had a hearing at which time they can assert their constitutional rights."

Well, what they mean is they didn't give them a further hearing in response to a petition.

[fol. 96] Remember, this complaint was filed in 1948. The Commission handed down its first decision in December, 1950. In the meantime we had had hearings. The examiner issued a proposed report. Each side filed exceptions to the examiner's report, and then replies to those exceptions were filed, and then it was orally argued in Washington before the entire Commission, and then when the decision came down in December, 1950, it was not until March, 1951, when they filed their petition for rehearing and reconsideration.

Now, I think it is just going a little too far to say that because the Commission didn't give them time then to come in and produce some other evidence, that it abused its discretion and, furthermore, that petition for further hearing does not comply with the rules of practice set out by the Commission because it doesn't show that this was new evidence, and it shows no reason in the world why that evidence was not submitted at the prior two hearings except that they didn't know that the Commission was going to prescribe a confiscatory rate. That is the only reason they gave.

Now, they knew what the plaintiff had proposed and we proposed rates substantially less than the Commission finally prescribed, and they had notice away back there that these lower rates were under consideration. They also knew that the voluntary rates which they were then carrying from California and Arizona were lower than the rates which the Commission has finally prescribed, yet in all that [fol. 97] time they didn't say one word about wanting a further hearing. They didn't make any such proposal after the examiner's proposed report came out reducing the rates. His proposal was somewhat different from what the Commission finally adopted, but if they thought that their constitutional rights were being violated, that, I think, was the time when they should have spoken up. But instead of that, they waited until three months after the final decision came out, and then they asked for a further hearing, and the Commission denied the further hearing but it did reopen the case and modified the decision, based on that application.

But their whole complaint here is that they didn't get that further hearing and because the Commission didn't grant that further hearing, it abused its discretion, and, therefore, it takes the property without due process of law.

Now, there are two classes of Interstate Commerce Commission cases. One is a revenue case, under which the Commission, of course, is required to prescribe rates which are reasonable and which yield a fair return on the property used for transportation services.

There is another case, type of case, where the Commission looks at rates which have already been prescribed or been

put into effect, and they — even those rates up so as to make it proper for all shippers.

Now, this case is the latter type of a case. Really revenue [fol. 98] was not involved here because our whole complaint was that our rates were not properly related with the rates from California and Arizona.

In connection with that type of case, most of the evidence that was put in, and we had 115 exhibits, some of them great, big exhibits like that, we had some 600 pages of testimony. There was a lot of evidence put in, but aside from the specific costs of refrigeration and things like that, which apply to vegetables generally, no one thought much about putting in the general railroad costs of handling traffic generally, but everybody was talking—what everybody was talking about was whether or not the rates from Texas were properly related to the rates from Arizona, California, New Mexico, and whether they were properly related to the rates which the defendants—the railroads provided voluntarily within the southwestern area.

On this question of discretion, whether the Commission must be required to grant a rehearing three months after it has closed its case, I want to call attention to the decision of the Interstate Commerce Commission—it is a District Court decision, but it has to do with the question as to whether or not the Commission should grant a rehearing, and Supreme Court cases are cited there which to me seem to be controlling, and here is what it says:

“It has been held consistently that rehearings before administrative bodies are addressed to their own discretion. [fol. 99] The Supreme Court has frequently held that the granting or denying of a petition for rehearing before the Commission is a matter within the sound discretion of the Commission, and its action thereon cannot be reversed except upon the clearest showing of abuse of discretion.”

These plaintiffs have not pled and they cannot prove that the commission abused its discretion.

On the question of confiscation, perhaps as Mr. Vesper has said, if they had just come in here and said, “They took our property without due process of law,” under the new rules of pleading, maybe that would have pled a case. I

don't know. But that isn't what they did. They do say that they took property without due process of law, but they attach these exhibits which show what the facts are, and the exhibits, of course, are a part of the pleading, and the courts have held, and I assume each of you gentlemen will agree that in the event you have an exhibit attached to your pleading which directly controverts the written pleading, that the exhibit is controlling, just like you might sue on a note and say that it hasn't been paid, and yet when you attach your note to the pleading and show that it has been paid, the note is controlling in that instance.

So, here what they do is to attach these findings of the Commission to their pleading and the findings of the Commission which, for the purposes of this argument were supported by substantial evidence, they cite these things:

[fol. 100] On page No. 3 of our memorandum, which we submitted with our motion to dismiss, we show rates within the southwest which were voluntarily published by the railroads in 1940, and the railroads put this information into the record, and it shows that the rates voluntarily published by them and maintained since 1940, except for various increases, for instance, at 700 miles, those rates yield \$122.66, compared to the prescribed rate of \$282.80.

The prescribed rates were over twice what these railroads have voluntarily published and been applying within the southwest.

There's a number of those rates there showing what those are. That was a finding by the Commission and based on evidence.

Then on page 4 of our memorandum, we show the per car earning, per ton mile earnings, on various classes of vegetables from California, compared with vegetables from Texas, and we show there that where they did prescribe reductions, the reduced rates which they prescribed yielded substantially more revenue per ton mile than the rates which the carriers themselves have been voluntarily applying from California to the same destination for a long number of years.

For instance, here's Detroit, Michigan: The railroads have had in effect rates on tomatoes from California which yield 16.3 mills per ton mile. The Commission's prescrip-

tion yielded 20 and a half mills per ton mile. Substantially [fol. 101] more than their own voluntary rates.

The Commission had all that before it when it considered this petition for rehearing, and it seems to me those facts definitely show that the rates prescribed by the Commission are not less than compensatory; because it is hardly possible that the railroads would voluntarily carry these rates within the southwest and from Arizona and California to these destinations all of these years or rates which yield substantially less than the Commission prescribed if they were not compensatory.

On page 6 of our memorandum, we show some rates on carrots, show the present rates and the prescribed rates. For instance, to Boston, Massachusetts, the rates on carrots from California, present rates, yield 12.0 mills per ton mile. The rate that the Commission prescribed, they reduced that rate to 10 and a half cents, and the rate that the Commission prescribed yields 15.8 mills, which is 3.8 mills higher than they had been voluntarily applying from California all these years.

There are a number of those illustrations.

That, to my mind, controverts their testimony that these rates are confiscatory. The record doesn't show it. Their pleadings doesn't show it.

On this question of why they didn't ask for a hearing earlier, or didn't submit this cost testimony at the hearing, where they had the opportunity to do so, their sole reason which they give is that "We didn't know the Commission [fol. 102] was going to prescribe rates as low as they did.

In other words, what they said was, "We didn't know they were going to prescribe confiscatory rates."

Well, on page 8 of our memorandum, I have shown a comparison between the rates which we proposed and the rates which the Commission prescribed, and the Commission, at 700 miles, we proposed seven to nine cents per hundred pounds and the Commission prescribed one to one. Now, it just doesn't make sense to me for them to come in here and say we didn't know anything like that was going to be prescribed. If they had put in what we asked them to, the rates would have been much lower than that, and it seems to me that these cases must be closed sometime and

it was the duty of the carriers, if they thought these rates were too low, to come in at those hearings—they had two hearings, and this proposal was before them at the opening of the first hearing, and if they thought they were confiscatory, that was the time to put them in, and the only reason they say they didn't put the testimony in then was because they didn't know the Commission was going to prescribe the confiscatory rates.

It seems to me, your Honors, that these pleadings, taken in connection with the exhibits, which are a part of the pleadings, simply do not show a cause of action. I thank you.

Mr. Gray: May it please the Court, our complaint in this proceeding alleges two things instead of the one referred [fol. 103] to by Mr. Leffingwell.

We first say that the Commission did abuse its discretion in refusing to grant a rehearing on the carriers' petition for rehearing, but we also, in paragraph 10 of the complaint, specifically make the claim that the rates prescribed by the order attacked here will confiscate the properties of the plaintiffs, and the carriers subject to the order. We do not put our whole case on the mere fact of the failure of the Commission to grant a rehearing. That is only part of the allegations in the complaint.

Now, in this complaint, plaintiffs allege that the order of the Commission, of January 7, 1952, will deprive them of their property without due process of law, and will produce revenues from those rates which will be less than the cost of performing the service for which the rates were prescribed. That direct allegation is made in the complaint and that is our claim.

Now, in their motions to dismiss, the government and the I. C. C. have grounded, in the first place, if I understand their contention, that the standard of reasonableness set up in the Interstate Commerce Act is identical to the level between validity and unconstitutionality, as defined by the constitution. From that they say that a finding by the Interstate Commerce Commission on a question of reasonableness, under the administrative standards of the Interstate Commerce Act, is a finding as to compensation under [fol. 104] the constitution, and because we, the carriers,

in this administrative proceeding before the Interstate Commerce Commission, did not introduce evidence going to the judicial issue of confiscation, we are barred from having a judicial determination of the constitutionality point.

Just briefly, there is a very decided distinction between the standard of reasonableness set out in the Interstate Commerce Act and that line between validity and unconstitutionality, which we call confiscation.

The Interstate Commerce Act sets up a standard of a zone of reasonableness. It has a maximum of reasonableness and a minimum of reasonableness. Now, it is true that this standard could not extend down below the level of confiscation as defined by the constitution, otherwise the standard would have been unconstitutional, so its bottom rests at the fortress on the constitutional line, but that zone of reasonableness extends above it and these complaints that we have with regard to the reasonableness of rates filed by a shipper tell us that the shipper says that the maximum of reasonableness has been passed beyond on the rates that we are charging. It is an attack that says the rates are high, too high.

Now, in those proceedings before the Interstate Commerce Commission, it is true that costs are relevant, but they are not controlling, and the evidence of overall transportation costs are not put in all those hearings.

[fol. 105] Judge Harper: Might I be so bold as to ask have you got any cases? I have been trying ever since this thing was filed, since it was before me, to get some of you people to give me some cases to show why this court should spend about two or three weeks trying a lawsuit of the nature that you refer to. To date I am still seeking that same information.

Mr. Gray: If your Honor please, there are, I say, two cases direct authority for our being here in this court. That is the B. & O. Case and the New York Case. Now, in the B. & O. Case, you had an administrative proceeding before the Interstate Commerce Commission to define the reasonableness of divisions. Now, that is an administrative standard in the Interstate Commerce Act which like the rates has got to be bottomed on the constitutional line.

Now, in that case, the proceeding and hearing was had, and an order was entered by the Interstate Commerce Commission prescribing reasonable divisions. Certain carriers affected by that order claimed that the divisions prescribed in the order would be confiscatory, and filed a petition for further hearing before the Interstate Commerce Commission, saying to the Commission "Please grant us a new hearing, a further hearing to prove confiscation, which we claim will be enforced against us by this order."

In the B. & O. Case the Commission turned down that petition for further hearing and the carriers took the case to [fol. 106] court. It went to the Supreme Court, and the Supreme Court there specifically found that the carriers in the administrative proceeding before the Commission were not required to anticipate that the Commission would enter an order confiscating their property, and that when the order was entered they had time to come before the Commission on the issue of confiscation in their petition for further hearing.

Now, in the B. & O. case they said that under such circumstances the carriers were proper in going to the District Court and producing their evidence of confiscation for the judicial determination of constitutionality, and the New York case also is along that line.

There the particular petition for further hearing, after the order of the Commission, did not tender further evidence, and in the New York Case, the Supreme Court distinguished the two in that vein, but the New York Case went further and said that if at the judicial hearing in the court it was found that evidence became necessary to pass on the judicial question of confiscation, the court should have stayed their hand and sent that case back to the Commission for the purpose of getting evidence on the questions that involve an administrative determination.

Now, we are here, as you know, arguing against these motions to dismiss, but we also have on file a motion to stay the court's hand here and issue an order remanding the case to the Commission for taking evidence on the administrative [fol. 107] question of cost.

Judge Harper: Of course, you can't cite any case where that has ever been done, can you?

Mr. Gray: Mr. Bierma is going to handle the affirmative argument on that point, but, yes, that has been done, the cases have been remanded to the I. C. C.

Judge Harper: I know they have been remanded but have they been kept by the court remanding?

Mr. Gray: Yes, a stay order entered in the court and remanded to the Commission for determination of administrative issues and Mr. Bierma will cover that in his argument.

Going back now to this distinction between the administrative issue of reasonableness and confiscation, we say the B. & O. case is direct authority contrary to the position taken by the government and intervenors on their motion to dismiss. There the Supreme Court held, as we contend, that we were timely in filing our petition for further hearing, and there asking for the Commission to grant a further hearing with regard to the confiscation issue.

Now, the second point relied on by movants is that the general increase case of 1951 in Ex Parte 175 deprives plaintiffs of their right to a hearing in this court.

The Texas Vegetable Growers and Shippers took one attack on Ex Parte 175 by saying that in the general increase [fol. 108] cases the Commission found that the carriers would receive a fair return on their rates as increased under the general increase case in 175, but that decision can be read in vain for any finding that would say that the order requiring rates in this proceeding, as increased under 175, would give the carriers a fair return on their property devoted to that service.

The general increase case covers revenue to the carriers and their total rate structure, and it does not involve the rate adjustment on individual commodities, and the Commission expressly so states in their decision in Ex Parte 175.

Now, the government and the I. C. C. say that because Ex Parte 175 granted a general increase, which will be applied to this rate, that this case, now they say, becomes moot.

The order in Ex Parte 175 was entered by the Interstate Commerce Commission on April 11, 1952. This case was filed in this court on March 10, 1952, just two weeks

before we would have had to publish tariffs in compliance with this order.

Now in the Ex Parte 175 case, increases were granted on rates to take care of rising costs, and in our complaint, we have attacked the order of the Commission in their Docket 30074, their order of January 7, 1952. That order itself sets out distant scales of distant rates; but also specifically says that those scales of rates, that the rates established on there, can be increased by the increases authorized in Ex Parte 175. We are complaining that the order, as entered, and [fol. 109] as increased under the full increases of 175, will confiscate our property. Now, because of the provision in the order itself, we did not feel it was necessary to supplement our complaint with a scale. The order itself says that the rates prescribed in the order are the distant scales of rate as increased by increases authorized in 175. We have complained that the rates prescribed by that order confiscate our property.

With regard to the grounds of group confiscation, I don't think it is necessary to spend much time there. That is a question of proof. Now, if we can prove that each of the carriers subjected to the order has been deprived of their property without due process of law, it is conceivable that we can do it, then we have stated a claim upon which relief can be granted under the Federal Rules of Civil Procedure.

Also, the same thing can be said about stating sufficient facts, that is relied upon by the parties to dismiss this complaint. Of course, it is not necessary for us to allege these facts in our complaint. If our complaint states a claim and as you heard from the argument the other parties have notice of what we are claiming, they know we are claiming confiscation on these rates, that is all that is sufficient under the Federal Rules of Civil Procedure, if we can by any conceivable—if it is conceivable that we can at the trial prove a case upon which relief can be granted.

But the last point that is relied upon is a contention that [fol. 110] you cannot have confiscation on an order prescribing rates on an individual commodity or a class of commodities.

Now, in our memorandum, in reply, the plaintiffs have

given a list of citations beginning with the North Dakota case, Northern Pacific against North Dakota, in which the Supreme Court has expressly said that as to rates on individual commodities, that an order prescribing such rates must return to the carrier the costs of performing the service plus something more. Now, those cases have never been overruled.

The movants have used three cases, which they contend sets up a contrary principle. One of them, a Market Street Railway Case, deals with total revenues, and the argument there was how much profit was going to be made between it and a case of rate prescribing—an order prescribing rates on an individual commodity, where a loss would be occasioned by the order on the individual commodity.

The second case they cite, relying on it, is an Atlantic Coast Line Case vs. North Carolina Corporation Commission. Now that case involved an order requiring a service which it was within the duty of the carrier to provide under their carrier obligations.

In that case, in the Atlantic Coast Line Case, the Supreme Court expressly made the distinction between an order fixing rates and an order requiring the carriers to perform a service which it was their duty and their obligation to perform.

[fol. 111] That same distinction was carried up into the Alabama Public Service Commission vs. Southern Case, in which Justice Frankfurter wrote a concurring opinion, relied on heavily by the movants here.

Now, in that case Justice Frankfurter, in making his statement, said: "On an order requiring service, it is not unconstitutional, even though a loss may be occasioned." Said: "Though it was different in the North Dakota Case, which was a case involving an order fixing rates."

In the cases cited by Justice Frankfurter, in the quotations used by the movants, the cases there clearly bring out the distinction between an order requiring a service, which it is the obligation of the carrier to perform, and an order fixing rates from which they are going to be paid for the service they have performed.

Now, in addition, the movants state that even though

you can have confiscation on an order fixing rates on a particular commodity or class of commodities, that there may be circumstances and conditions that justify a regulatory body prescribing rates to cause a loss in that instance.

Now, if there are such circumstances and conditions, and in the cases we have cited in support of our contention, it says that the carriers cannot be required to establish a rate on a particular commodity or class of commodity, which would occasion a loss to them, but if there is some circumstance and condition, that is in the nature of an affirmative offense and we do not have to negate all those affirmative defenses in our complaint.

On this motion to dismiss we have stated a claim of confiscation and the other parties know it, and they know what our claim is, and consequently that is not grounds for dismissing the complaint.

Judge Thomas: Rates may not be reasonable in any sense, and yet confiscatory?

Mr. Gray: No, I don't believe that would be true.

Judge Thomas: Is that the difference between the standards to be applied by the Interstate Commerce Commission and the standard the court may apply?

Mr. Gray: The rate may not be reasonable and be confiscatory. If the bottom—

Judge Thomas: I wasn't sure I got your idea about it.

Mr. Gray: The bottom of the zone of reasonableness can be no lower than the constitutional level or the standard would be unconstitutional, but the rate may be well above the line of confiscation and still be a reasonable rate. The issue is to determine what a reasonable rate is. It doesn't mean you are dealing with the level of confiscation. You may well be dealing way above the level of confiscation and cost would be of little controlling weight in the case.

There has also been quite a bit of argument upon the [fol. 113] facts, about comparison with other rates. I do not believe that that is proper on a motion to dismiss.

Now, these rates that are maintained by some carriers to the proceedings, some not, are maintained from other areas, may very well be explained. It may well be that they are confiscatory rates, too. There are certain other facts that can be brought in in explanation, but that is

a matter for trial; for instance, it was stated in the argument that the carriers voluntarily maintained lower bases of rates than those prescribed from Texas to official territory.

Now, as to that, those rates are not voluntarily maintained. They are maintained because of an order of the Interstate Commerce Commission, which suspended a tariff designed to increase those rates.

There are many facts that can be brought in, but those are matters for trial and they are not to be tested in the motion to dismiss. Our motion to dismiss has stated a claim upon which it is possible for us to prove a case upon which relief can be granted, and the motion to dismiss should be denied.

Judge Harper: What do you say about the argument they advanced you are not even attacking all of the rates but only a part of it?

Mr. Gray: Now, on that, that argument is based upon the exhibits attached to the petition for further hearing before the Interstate Commerce Commission. In that petition for further hearing, we have alleged confiscation [fol. 114] in the rates covered by the order and said as illustrative of the costs that we can prove we show the costs on this particular traffic. Now, it didn't say we did not allege part of the traffic, we alleged that the rates prescribed on the traffic involved would confiscate our property, and submitted this evidence which was all we had at the time as illustrative of the costs we could prove if we had a further hearing.

Judge Harper: Of course, it is a mystery to me, to be perfectly frank with you, I don't know much about I. C. C., if you can proceed as you gentlemen are proceeding in this case, there can never be any end about rate matters. In other words, you hear them, if you are not satisfied, you claim they are confiscatory and delay the matter two or three years, frankly, I don't know anything about it, but it just doesn't make sense.

Mr. Gray: If your Honor please, you can abuse many judicial processes if the courts will let you, but that doesn't mean that the remedies are not there.

Now, in these cases before the I. C. C., costs are—it is

the rare case in which costs are introduced. We are not dealing with the issue of confiscation. We are dealing with a standard of reasonableness in the the act which is general, and the Commission has held in many cases the best evidence is comparison for that standard. Now, if we are required in every case before the Interstate Commerce Commission to put in evidence of confiscation, or else be [fol. 115] bound, we are never going to get a judicial hearing on the issue of confiscation. We would have to come in and as the affidavit attached to our motion to stay and remand shows, the obtaining of transportation costs is an intricate, an involved, an expensive process, if we are going to have to produce transportation costs on every rate case that we have before the Interstate Commerce Commission, it is going to in effect deprive us of our constitutional rights on confiscation. We can't do that, and I don't think the Interstate Commerce Commission would let us put in that heavy evidence on these small rate cases. Well, that is not—they would let us do it, because it is relevant, but it would certainly burden the administrative.

Judge Harper: Anything but relevant.

Mr. Gray: They are relevant, yes, they are. I thank you.

Mr. Vesper: I would like to have a few minutes on rebuttal. I would like to point out on the question of whether there is a difference between the constitutional requirement of just and reasonable rates and the administrative standard, that the Supreme Court, in discussing the requirements of the Natural Gas Act, which is patterned after the Interstate Commerce Act, and which are almost identical in wording said—in the Hope Natural Case, I quote: "Since there are no constitutional requirements more exacting than the standards of the act, a rate order [fol. 116] that conforms to the latter has not run afoul of the formula." And the syllabus in Smyth vs. Ames also states that the constitutional standard is just and reasonable rates.

Now, the carriers say that the New York Case distinguishes the P & O. Case and affirms. I do not think that that is the proper conclusion to be drawn from the New

York—so called class rate case. There the court distinguished and showed that it was not in point. They did not affirm it. They did not have the question of confirming or overruling. They merely said it was not in point in this case.

As to the question of the New York Case providing for remand on these factual issues, particularly where one commodity is involved, I think it is important to note that the Supreme Court used the subjunctive tense in discussing the matter. They said, "If it were necessary in a case involving alleged confiscation as to single rates on less than carload traffic," then they cite the North Dakota Case, but they say, "but see the Hope Natural Gas Case, which is a clear expression of doubt as to whether a case of confiscation can be proved as to an individual commodity."

Now, on the question of the group confiscation, if they prove as to each carrier that the rates are confiscatory, of course, they are not providing it as a group. The group confiscation is where they attempt to merge the fact that one carrier is losing money and another carrier is making money, but together they are losing money. That is the [fol. 117] allegation of group confiscation, and we merely are pointing out the fact that that cannot—such a suit cannot be maintained, and the carriers having sense can see this, when they say we must prove as to each case, that is proving it as to individual carrier and not as a class.

Now, on the question of whether they are entitled to cover costs of service on each commodity, I think it might be important to point out to the court the so-called fourth section of the Interstate Commerce Act, if I may read that to the court.

That section provides: "It shall be unlawful for any common carrier subject to this part or part 3 to charge or receive any greater compensation in the aggregate for the transportation of passenger or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction."

Now, the first case involving that section came up under a state statute of similar import. The question was raised as to whether if the more distant rate was non-compensatory, whether the statute could require them to apply that

rate at intermediate points where it would also be non-compensatory. They argue that they could not be forced to do that, even though they voluntarily had established a non-compensatory rate at the further point, they could not be enforced to give similar treatment to the intermediate point.

[fol. 118] In the case of Louisville and Nashville Railroad vs. Kentucky, 183 U. S. 503, the fourth section of the Kentucky statute was upheld. In Intermountain Rate Case, 234 U. S. 459, the court points out the carriers concede that if the fourth section of the Interstate Commerce Act was mandatory in every case, that the L. & N. case would have covered it and would have taken care of its constitutionality. I should say that the Intermountain Rate Case involved a question of the provision in the fourth section that the Commission could exempt carriers from the provision of that section if they show that the rate for the more distant point was reasonably compensatory and they argued because of the discretion that that would affect the determination, but the court upheld the fourth section.

It might be pointed out that under this discretionary power, if the Commission found that the rates to the more distant point was not compensatory, the carrier could, never the less, put it into effect, but it would have to apply that same rate at intermediate points even though it were confiscatory at those points, so the standard of confiscation may be affected definitely by the policy of the carrier in establishing non-compensatory rates on other traffic. After all, the standard of the Interstate Commerce Act is that rates shall be just and reasonable, and that the New York case points out. That word of "Justness" is an important word, besides the question of reasonableness, and if there is a difference in rates which cannot be justified [fol. 119] on the basis of difference in costs of handling it or other condition, that rate is irrational and is unjust and unreasonable.

Mr. Bierma: If the Court please, I wish to speak briefly on the motion filed by the plaintiffs to stay and remand the cause and particularly to the questions raised by Judge Harper.

Judge Harper: You may have filed them, I don't know,

the last three or four days or week, I haven't had time to look at them, but I have tried for two or three weeks to get them. Mr. Ware did finally give me one or two citations.

Mr. Bierma: On page 7.

Judge Harper: I say it may be in there, but in the early stages, I was trying to get some information to pass on to the other judges and was having a terrible time doing it.

Mr. Bierma: It might be well to outline briefly the background of this motion to stay and remand.

The Baltimore and Ohio case has been referred to both by Mr. Gray and Mr. Vesper. That is the case in which the District Court did take evidence on the matter of confiscation. I believe that probably this court could take evidence on the matter of confiscation. However, in the New York case and in the cases that are cited on page 7 of our memorandum brief, you will find that there was a shift in the attitude of the courts towards taking evidence of this voluminous nature. I think the rule is actually one of practicality. The Supreme Court in the General American Tank Car case stated specifically that the proper course that was to be followed, and I think it is the one actually that relieves the court of the burden, when you have an administrative problem that is posed before you, the proper course is for the court to stay its hand, retain jurisdiction in the case, send the administrative problem to the Commission for decision and then the case comes back to the court, and in that way you relieve the court of the burden of listening to a week or two weeks of complicated evidence, involving costs, and with all due deference to the court, the administrative body, I believe, is more properly adapted to hearing evidence of that sort.

In the General American Tank Car case, which is cited on page 7 of our memorandum brief, the case was sent by the court back to the commission and then came back to the court again. The same thing was followed in the Thompson case, where a question was sent to the commission and then back to the court, and the court then reached a determination upon the judicial issue with the benefit of the work of the commission on the administrative issue.

If I can diverge to a case which I am handling person-

ally now in Federal Court in Alexandria, we had exactly that same situation arise. It is a suit for an accounting and it involved an administrative issue which Judge Bryan felt he did not want to decide without first having the benefit of the Commission's views, a matter involving technicalities of rates. Judge Bryan issued a stay and remand [fol. 121] order. We are now before the commission. When the commission issues its report and order we will then go back to Judge Bryan and he will dispose of our action for an accounting. In other words, the Federal Court there had jurisdiction, of course, of our action for an accounting in the same way that we believe that you have jurisdiction of our action alleging confiscation. But we believe that as a practical-matter, the best course to pursue for this court would be to refer this administrative problem of costs to the Commission, and then when that issue has been determined, we can come back before you then and you can then rule upon the judicial issue of costs.

Mr. Heywood's affidavit and the reference that is made to the New York class rate case, I believe fully demonstrates that the determination of transportation costs is a difficult procedure and one which the Commission is best adapted to handle. For that reason we ask that first that you deny the motion to dismiss and then that you grant our motion to stay your hand, remand the case to the Commission for a determination of the administrative issue, and then we will be back here to decide the judicial issue of confiscation.

Now, with regard to Mr. Leffingwell's statement that he will be hurt and suffer irreparable damage, we have no objections at all to a very early hearing before the Commission to a rapid disposition of the case before the commission. Insofar as he is suffering damage, Mr. Leffingwell has the full protection of this court. If this court [fol. 122] feels that Mr. Leffingwell should be protected during the pendency of this proceeding before the Commission, this court certainly has the authority to give him that protection. On the other hand, should the prescribed rates become effective, as you know, we have no way under the law to recover any of the amounts of money which will be paid on the lesser basis of rates should the

Commission's order be decided to be in violation of our constitutional rights.

Judge Thomas: You mean if this court refers the question to the Interstate Commerce Commission in just what manner would we protect Mr. Leffingwell?

Mr. Bierma: I think you could require a bond from us or an agreement whereby we could pay down the basis of the prescribed rates where they were higher than the present rates. I think that if this court felt that that was necessary you have full authority to do that. Thank you.

Mr. Leffingwell: If the Court please, I want to say something about this protection. Undoubtedly this court has the power to require a bond, or you could impound the money collected or anything like that, but the point I want to present to you is that that isn't going to give us any protection.

We have two things involved here. The main thing is our question of market competition. We have to meet the competition of our Arizona and California competitors, and if the rates are not reduced as prescribed by the Commission, the chances are we are just not going to sell. [fol. 123] Now, then, if we had a bond to protect us, I don't know how we could ever prove any damages. Those damages that we suffer; if any, would be too remote to ever be able to give definite proof on.

Then there is another thing connected with the payment of freight charges on the shipments that we actually make. These shipments are nearly all billed collect, and freight charges paid to destination. Title passes at the point of origin in some cases and point of destination in others, but under the Darnell-Tenzer case, the person who pays the freight charges to the railroad is the one who is entitled to recover in a case of this kind, so maybe somebody in New York might be able to recover but I don't think it would do our people any good. I see no way in which this court can give us any substantial protection. It might be of some help and, of course, if the order is stayed, a proper bond should be required, but I don't see how it is anything like protection for us.

Now, then, there is one thing, of course, we are opposed to this order to remand. We think the order to dismiss

should be granted, the motion to dismiss should be granted and the case dismissed, but the motion to remand, as I understand it, is for the sole purpose of determining the costs on vegetables moving from Texas.

Now, if this court should conclude to grant the motion to remand, we want it remanded to the Commission for all purposes. We want it wide open so we can go in there [fol. 124] and not only have the costs shown for the Texas vegetables but for the California, Arizona and everybody. If we are going to have it remanded to the Commission, let's have it remanded for all purposes.

Mr. Vesper: I would like to add, Mr. Leffingwell's statement about the scope of the motion to remand, of course our position is that our motion to dismiss is proper. However, as to remand, as long as the plaintiff, if he can be protected, I should say the shippers are protected, why, of course I think the government feels even though a person really hasn't any legal right to a further hearing, it is sometimes best to let him have his say as long as nobody else is hurt.

I would like to point out as Mr. Leffingwell did that the motion to remand is solely for the purpose of cost of transporting vegetables as prescribed.

Now, the New York case, which they cite, takes the evidence on the question of confiscation. Now, I think that that is the issue here. If it is remanded to the Commission, it is to get their views as to whether there is confiscation, taking into effect all the elements that are involved in the question of confiscation. Secondly, even if that were not the case, I think that the question of the revenue to be derived from the traffic involved is a very important point in this case, to compare the cost would leave to this court the question of the determination of revenue and I think [fol. 125] if you are interested the question is the relationship of cost to revenue, that is the issue in this case. So I believe that the remand that Mr. Leffingwell suggested should be for all purposes, of reopening the case to include this specifically, the acceptance of this, but of other evidence as bears upon the relation of confiscation or any other issue in the case.

Mr. Bierma: The only difficulty with the reopening for

all purposes is this, that this court must decide whether or not confiscation has occurred. It is for that reason that we simply ask that the case be remanded solely for the purposes of cost determination. I certainly do not believe that the case should be remanded to the Commission for the purpose of showing cost of transporting California vegetables or New Mexico vegetables. This case at the present moment simply involves the carrying of vegetables from Texas to the destination territory.

If you follow the course suggested by Mr. Leffingwell, I assume that it would be a retrial entirely of the entire case. If Mr. Leffingwell is not interested in the effective date of the order, I presume we have no objection to trying the case all over again. Mr. Leffingwell's suggestion is one that I think will prolong the litigation rather than shorten the litigation.

I don't believe we would have any objection to the Commission determining a comparison of the costs and the revenues from the rates. That is simply a mathematical [fol. 126] matter. I mean we would put in the revenue in this court; I presume we could put them in before the Commission just as well.

Mr. Brooks: My name is Brooks. May I rise to say one thing?

If it please the Court, I find myself in a peculiar position here. My name is Frank Brooks. I am an attorney from Dallas, Texas.

In this proceeding from which the appeal is taken, I represented the California and Arizona interests. We had not intervened in this case, do not anticipate intervening unless it takes a scope different from that shown by the pleadings. However, the argument here has developed something that I did not see from the pleadings and that is a remand for the complete retrial of this case. Our going into the situation on California and Arizona's vegetables, which has been decided by the Commission, which no motion for reconsideration has been filed, and on which no attack has been made, under those circumstances, on behalf of those parties, if I can properly at this time, I would like to say that my clients would certainly object to going back and trying this case all over insofar as the

California and Arizona rates are concerned, because nobody has complained about what the Commission did on our rates, and I would like for the court to take that into consideration if you are contemplating a remand for any particular purpose.

[fol. 127] I am sorry that I had to speak to the court without proper introduction but this came up on the spur of the moment.

Judge Thomas: The court has not come to any conclusion about anything. We are just trying to see what was the expeditious way of getting at this matter. The issues that you have submitted, the arguments, are weighty and seem to us important. It should be given careful consideration by the court. We have determined, therefore, that in order that we may give them the consideration they deserve, this court will adjourn at the present time, subject to call when we decide the matters that are submitted in these motions.

Judge Harper: Gentlemen, you have had this matter up about this injunction. That is a matter of some concern. I rather gathered the impression from the conferences that I have had with the various attorneys since it was filed in Division 3, where most of the conferences—as a matter of fact, I think most of them have been with me, do I understand correctly that at the present time there is virtually no movement of these products?

Mr. Leffingwell: I think that is correct, your Honor. There is some movement but the major movement takes place in the fall and winter of the year.

Judge Harper: What time, now, what time, Mr. Leffingwell, is this matter going to become serious to your client?

Mr. Leffingwell: In September.

[fol. 128] Judge Harper: In September?

Mr. Leffingwell: And as you perhaps know, the order has again been postponed until August 1st.

Judge Harper: I understand that, and, of course, the proposition that you are up against in the extension of the order, there has been no mention made this morning with respect to the request for an injunction. My recollection about the matter was that these—the plaintiffs here indicated that they wanted a temporary injunction pending in this thing, and I have had to, every time I have a conference,

get on Mr. O'Donnell, and some of them representing the government, and one thing and another, and they are always worr-ing about something else and giving no concern to the injunction, now the injunction matter is a matter of some concern because Judge Thomas here is from Iowa, as you gentlemen know, it isn't easy to reconvene this matter, and in each instance it has been put off just long enough to where that it is more of an aggravation than it is a help. I think we might be better off if it was presented and passed on but as I understand it now it is off until the 1st of August.

Mr. Leffingwell: That is correct.

Judge Harper: That means that the rates have to be filed, I believe, by the 1st of July?

Mr. Leffingwell: About the latter part of July. They have to have 30-days' notice under the order.

[fol. 129] Judge Harper: Well, that means, doesn't that mean the 1st of July?

Mr. Leffingwell: Oh, yes, that's right.

Judge Harper: That they have to file the rates?

Mr. Leffingwell: Oh, yes, that's right.

Judge Harper: That is another six weeks. Now, that is a matter of some concern, because I got the impression from you gentlemen that you were not ready if it was set for trial on the merits this morning, why you were not ready even if there had been no motions filed, it could not have been tried. That was the information I had, and while July 1st is six weeks away, at the same time, it is not a great length of time away, and Judge Thomas, I am sure, is probably leaving this week, aren't you, Judge?

Judge Thomas: I hope to.

Judge Harper: And unless you gentlemen can come to some agreement on that, it is a matter we might better give some thought to before we adjourn, because you know you gentlemen may not have but one lawsuit but the judges here have about 300 civil cases a year to dispose of and 150 criminal cases. You just can't lay everything aside and go into a matter in a hurry unless you put somebody else out, and you sort of like to take a few of them in turn and sometimes when you get into criminal matters you don't have any choice about the matter.

Mr. Bierma: In view of Judge Harper's remarks, we have

[fol. 130] discussed this matter with counsel on the other side, we asked if they would waive the procedural requirements of five days' notice and asking for a temporary order. As I understand that is agreeable with them. So that this time we would like to move for a temporary injunction to issue and with the condition, of course, our offering bond in suitable amount and that matter will be disposed of.

Judge Harper: The principal reason I raised it is because it is a matter you are eventually going to get unless you are going to try this lawsuit in the very near future, and at the rate we have been going I don't anticipate that unless we get rid of it on this motion to dismiss and that was the only reason I suggested it because just didn't see the need of putting Judge Thomas to the inconvenience and the government to the expense of his having to come back down here many many miles when it is a matter we can rid of today, in the event, of course that the motion to dismiss is overruled.

Mr. Leffingwell: The Texas Shippers, of course, will oppose the issuance of either a temporary or permanent injunction. We do waive the requirement of five days' notice for the hearing, so that this hearing here this morning can take the place of that, but we suggest that a proper bond be set. I think it should be double the amount of money that they will collect while the case is pending and nobody knows how much that is. I don't. But it will be substantial.

[fol. 131] Mr. Pou: If the Court please, may I say on behalf of the Commission we don't want to be enjoined; of course, and I am not authorized to enter into any agreement whereby the Commission would be enjoined, but in the event the temporary injunction is issued, the Commission would certainly hope that the court would require these parties to enter into a good and sufficient bond for the protection of these shippers as nearly as such a bond would protect them.

Now, for practical reasons that Mr. Leffingwell has pointed out, I am somewhat doubtful if they will get any real protection.

Judge Harper: Could you give any approximation of the amount of bond?

Mr. Pou: No, sir, but I am hoping, it would only be a guess and I just told the railroad lawyers they could probably guess better than a government lawyer could in that kind of a situation. I have no idea what the difference in revenue between the prescribed rates—

Mr. Leffingwell: I might say this, your Honor, on page 17 of the complaint is a statement showing the present revenues and the prescribed revenues on 9,754 cars originating on two lines. I would think that probably would be a third of the business that would be involved, and the carriers state that the reduction in revenues on those cars would be 82,000 plus 41,000, about 124,000. I would just make an offhand guess, and I have no figures, I would say [fol. 132] that at least three times a hundred and twenty thousand dollars per annum would be involved. I don't know whether my associates over there for the plaintiffs would agree with that or not, but it would run somewhere between three and five hundred thousand dollars a year, I would think.

Judge Moore: Three times how much?

Mr. Leffingwell: Three times 120.

Mr. Pou: That is on a per annum basis.

Mr. Leffingwell: I assume this is a per annum basis. This statement says "Through revenue on traffic for the 1949-50 season from two lines." I think that is for a season.

Mr. Vesper: I might say we are letting the Commission, the United States is letting the Commission lawyers speak for the United States on this point of temporary injunction.

Mr. Gray: If the Court please, I haven't any basis today of making a guess as to how much money would be involved between the rates prescribed and presently applicable rates, whether it will be three or four hundred thousand dollars, I haven't any idea, but a satisfactory—a sufficient bond be issued is one thing, and if we could, we would like to be permitted time to investigate, if we may, and find out about how much money is involved on an annual basis. The figures that Mr. Leffingwell read with regard to the 81,000 and 41,000 were figures to show difference in revenue based upon the tonnage that was mov-

ing in the '49-50 shipping season. It is an annual figure [fol. 133] based upon the volume of traffic then moving and I don't know whether that is still the amount of money that would be involved now.

Judge Thomas: The court then will take this matter under consideration along with the rest of the case, the issuance of an injunction and the amount of the injunction—I mean the bond, the amount of the bond for the injunction when we get into it in arriving at a conclusion.

Is there anything further anyone wishes to say with reference to the matter before we adjourn? If not, the court will be in adjournment.

(Whereupon, the court stood in adjournment.)

* * *

[fol. 134] Reporter's Certificate to foregoing paper omitted in printing.

[fol. 135] IN UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

Civil Action No. 8465(3)

THE BALTIMORE AND OHIO RAILROAD COMPANY; BOSTON AND
MAINE RAILROAD; Erie Railroad Company; Guy A.
Thompson, Trustee of Missouri Pacific Railroad Com-
pany, New Orleans, Texas & Mexico Railway Company,
The Beaumont, Sour Lake & Western Railway Company,
The St. Louis, Brownsville and Mexico Railway Com-
pany, International-Great Northern Railroad Company,
San Antonio, Uvalde & Gulf Railroad Company, and San
Benito and Rio Grande Valley Railway Company; The
New York Central Railroad Company; The New York,
Chicago and St. Louis Railroad Company; The New York,
New Haven and Hartford Railroad Company; The
Pennsylvania Railroad Company; St. Louis Southwest-
ern Railway Company; St. Louis Southwestern Rail-
way Company of Texas; Texas and New Orleans Rail-
road Company; The Texas and Pacific Railway Com-
pany; Wabash Railroad Company, on Behalf of Them-
selves and All Others Similarly Situated, Plaintiffs,

vs.

UNITED STATES OF AMERICA, Defendant,

and

INTERSTATE COMMERCE COMMISSION and TEXAS CITRUS &
VEGETABLE GROWERS AND SHIPPERS, Intervening Defend-
ants

APPEARANCES:

Richmond C. Coburn, Toll R. Ware, James B. Gray and
Robert H. Bierma, Attorneys for Plaintiffs.

William V. O'Donnell, Asst. U. S. Atty., and Frank V.
Vesper, Special Asst. Atty. General, Attorneys for United
States.

A. Lee Pou, Attorney for Interstate Commerce Commis-
sion.

Frank A. Leffingwell and B. W. LaTourette, Attorneys for Texas Citrus & Vegetable Growers and Shippers.

Before Thomas, Circuit Judge, Moore and Harper, District Judges.

HARPER, Judge:

[fol. 136] MEMORANDUM OPINION—Filed June 18,
1952

This is a suit to enjoin, set aside, annul and suspend a certain order of the Interstate Commerce Commission, issued in a proceeding instituted by complaint of shippers under the Interstate Commerce Act, entitled "Texas Citrus and Vegetable Growers and Shippers vs. Atcheson, Topeka & Santa Fe Railway Company, et al, Docket #30,074." Sections 1336, 1398, 2284 and 2321-2325, Title 28, U. S. C., confer jurisdiction on this court in this matter.

The complaint before the Commission alleged that the rates and charges on fresh vegetables in carloads from origins in Texas to destinations in the United States other than Texas, were unreasonable, unduly prejudicial to vegetable growers and shippers in Texas, and unduly preferential of vegetable growers and shippers in Arizona, California and New Mexico. The complaint requested the Commission to prescribe rates for the future. The Commission by order of December 21, 1950, prescribed maximum rates on vegetables.

The carriers (plaintiffs here), on March 21, 1951, filed a petition for reconsideration and rehearing, and as the basis therefor claimed that the rates prescribed by the Commission were confiscatory, and if made effective would deprive them of their property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States, and sought opportunity to offer proof on this question. The Commission granted reconsideration on the record as made, but did not permit the submission of additional evidence. On January 7, 1952, the Commission issued its further report and order modifying the rates to some extent. On February 15, 1952, the carriers (plaintiffs here) again requested the Com-

mission to grant a rehearing to afford the parties thereto an opportunity to offer proof in support of their averment that the rates prescribed in the order were confiscatory, which petition was denied by the Commission by its order [fol. 137] dated March 7, 1952.

The plaintiffs brought this action seeking to restrain the enforcement of the order of the Commission dated January 7, 1952, and as grounds therefor allege that the refusal of the Commission to grant a rehearing as requested was and is arbitrary and capricious and an abuse of its discretion, contrary to the provisions of the Interstate Commerce Act and that the rates prescribed are confiscatory. The plaintiffs desire to present testimony before this court on that issue, but do not here contend that the rates are not just and reasonable based on the record.

The defendant, United States of America, and intervening defendants, Interstate Commerce Commission and Texas Citrus & Vegetable Growers and Shippers, have filed motions to dismiss. The plaintiffs have filed a motion to stay this cause, but with jurisdiction retained in the court, and to remand the cause to the Commission for the sole purpose of administrative determination by said Commission of the cost of transporting vegetables.

The question for the court is whether or not the plaintiffs have a right to a trial de novo at this stage of the proceedings on the question of confiscatory rates. One of the important elements in the determination of just and reasonable rates is cost of service, but the question here is: When must such evidence be presented?

In dealing with the question of confiscatory rates the Supreme Court in *New York v. United States*, 331 U. S. 284, 1. c. 335, said:

"As stated in *Manufacturers R. Co. v. United States*, 246 U. S. 457, 489-490, and in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 53-54, correct practice requires that, where the opportunity exists, all pertinent evidence bearing on the issues tendered the Commission should be submitted to it in the first instance and should not be received by the District Court as though it were conducting a trial de novo."

In *United States v. Capital Transit Company*, 338 U. S. 286, 1. c. 291, the Supreme Court said:

[fol. 138] "It is also argued here that the orders should be set aside because they are confiscatory. But the record fails to show that this issue was properly presented to the Commission for its determination. Therefore the question of confiscation is not ripe for judicial review."

And in *Alabama Public Service Commission v. Southern Railway Company*, 341 U. S. 341, 1. c. 348, the court said:

"And, whatever the scope of review of Commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved."

In *New York v. United States*, supra, the District Court permitted the presentation of further evidence with respect to confiscation, but the Supreme Court said, 1. c. 336:

"Thus we think that if the additional evidence was necessary to pass on the issue of confiscation, the cause should have been remanded to the Commission for a further preliminary appraisal of the facts which bear on that question."

In *Baltimore & Ohio Railroad Company v. United States*, 298 U. S. 349, testimony with respect to confiscation was permitted in the District Court and approved by the Supreme Court, but that case involved the division among carriers of the revenue resulting from admitted reasonable rates, and is not in point in this proceeding.

The complaint before the Commission dealt only with rates and the plaintiffs here were therefore on notice of the rates sought and were required to answer that complaint before the Commission. The plaintiffs here seek to relitigate a factual question involved in the proceeding before the Commission on which they initially elected not to present evidence. Cost of service has long been recognized as an important element in the reasonableness of any

rate. The Supreme Court in *Manufacturers Railroad Company v. U. S.*, 246 U. S. 457, at pages 488 and 489, discussed the subject of confiscation and the presenting of evidence on that question before the courts. At Page 489 the court said:

"Nevertheless, correct practice requires that, in ordinary cases (underscoring ours), and where the opportunity is open, all the pertinent evidence shall be submitted in the first instance to the Commission, and that a suit to set aside or annul its order shall be resorted to only where the Commission acts in disregard of the rights of the parties."

[fol. 139] Rate cases such as this suit are among the ordinary cases referred to in the *Manufacturers Railroad* case, supra. The pertinent evidence bearing on the issue of confiscation should have been submitted to the Commission in the initial hearing, but was not. Such testimony will not be received by the District Court in this suit.

The plaintiff's motion to stay and remand is accordingly overruled, and the defendants' motion to dismiss is sustained, and the cause is ordered dismissed.

/s/ Seth Thomas, United States Circuit Judge.

/s/ Geo. H. Moore, United States District Judge.

/s/ Roy W. Harper, United States District Judge.

[fol. 140] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed July 3, 1952

Now come The Baltimore and Ohio Railroad Company; Boston and Maine Railroad; Erie Railroad Company; Guy A. Thompson, Trustee of Missouri Pacific Railroad Company, New Orleans, Texas & Mexico Railway Company, The Beaumont, Sour Lake & Western Railway Company, The St. Louis, Brownsville and Mexico Railway Company, International-Great Northern Railroad Company, San Antonio, Uvalde & Gulf Railroad Company, and San Benito

and Rio Grande Valley Railway Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The New York, New Haven [fol. 141] and Hartford Railroad Company; The Pennsylvania Railroad Company; St. Louis Southwestern Railway Company; St. Louis Southwestern Railway Company of Texas; Texas and New Orleans Railroad Company; The Texas and Pacific Railway Company, and Wabash Railroad Company, plaintiffs in the above-entitled cause, and, considering themselves aggrieved by the judgment and order of this Court overruling plaintiffs' motion to stay and remand, sustaining defendant's motion to dismiss, and dismissing the cause, entered herein on June 18, 1952, hereby pray an appeal from the said final judgment and order to the Supreme Court of the United States.

The particulars wherein the said plaintiffs consider the judgment and order of this Court erroneous are set forth in an Assignment of Errors filed herewith.

Pursuant to Rule 12 of the Supreme Court of the United States, as amended, there is also presented to this Court here with a statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the said judgment and order of this Court.

Wherefore, the said The Baltimore and Ohio Railroad Company; Boston and Maine Railroad; Erie Railroad Company; Guy A. Thompson, Trustee of Missouri Pacific Railroad Company, New Orleans, Texas & Mexico Railway Company, The Beaumont, Sour Lake & Western Railway Company, The St. Louis, Brownsville and Mexico Railway Company, International-Great Northern Railroad Company, San Antonio, Uvalde & Gulf Railroad Company, and San Benito and Rio Grande Valley Railway Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The New York, New Haven and Hartford Railroad Company; The Pennsylvania Railroad Company; St. Louis Southwestern Railway Company; St. Louis Southwestern Railway Company of Texas; Texas and New Orleans Railroad Company; The Texas and Pacific Railway Company, and Wabash Railroad Company, pray that their appeal to the Supreme Court of the United

States be allowed and that a citation be issued as provided [fol. 142] by law; that an order be entered fixing the amount of bond for costs on appeal; and that a transcript of the record, proceedings, and documents upon which said judgment and order were based, duly authenticated, be transmitted to the Supreme Court of the United States under the rules of said Court in such cases made and provided.

s/ Robert H. Bierma, H. D. Boynton, T. O. Broker, J. P. Canny, Richmond C. Coburn, Frank H. Cole, Jr., L. P. Day, R. B. Elster, R. J. Fletcher, James B. Gray, Toll R. Ware, Attorneys for Plaintiffs.

July 3, 1952.

[fol. 143] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 3, 1952

The Baltimore and Ohio Railroad Company; Boston and Maine Railroad; Erie Railroad Company; Guy A. Thompson, Trustee of Missouri Pacific Railroad Company, New Orleans, Texas & Mexico Railway Company, The Beaumont, Sour Lake & Western Railway Company, The St. Louis, Brownsville and Mexico Railway Company, International-Great Northern Railroad Company, San Antonio, Uvalde & Gulf Railroad Company, and San Benito and Rio Grande Valley Railway Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The New York, New Haven and Hartford Railroad Company; The Pennsylvania Railroad Company; St. Louis Southwestern Railway Company; St. Louis Southwestern Railway Company of Texas; Texas and New Orleans Railroad Company; The Texas and Pacific Railway Company; and Wabash Railroad Company; having filed their petition for an appeal to the Supreme Court of the United States from the judgment and order of this Court entered on June 18, 1952, dismissing the complaint of the said The Baltimore and Ohio Railroad

Company, et al.; in the above-entitled cause, and having also filed their Assignment of Errors and statement disclosing the Basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the said judgment and order of this Court, and having in all respects conformed to the statutes and rules of Court in such cases made and provided;

It is, therefore, ordered and adjudged that an appeal to the Supreme Court of the United States as prayed for be, and the same is hereby, allowed.

It is therefore ordered that a citation issue, returnable within forty days from the date hereof;

It is further ordered that a certified copy of the record, proceedings, and documents upon which said final decree and order were based be transmitted to the Supreme Court of the United States under the rules of the Supreme Court in such cases made and provided.

It is further ordered that the said The Baltimore and Ohio Railroad Company, et al., give bond as security for costs on appeal in the sum of Two Hundred and Fifty Dollars (\$250.00).

Enter:

s/ Geo. H. Moore, United States District Judge.

Dated: July 3d, 1952.

[fols. 145-146] Citation on Appeal (omitted in printing)

[fol. 147] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed July 3, 1952

Now come The Baltimore and Ohio Railroad Company, et al., plaintiffs in the above-entitled action, and file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the judgment and order of this Court entered on June 18, 1952:

1. The Court erred in sustaining defendants' motion to dismiss.

2. The Court erred in overruling plaintiffs' motion to stay and remand.

3. The Court erred in dismissing the cause.

4. The Court erred in concluding as a matter of law that plaintiffs had no right to a hearing at which they could introduce evidence of confiscation after the Interstate Commerce Commission entered its order of January 7, 1952.

[fols. 148-167] 5. The Court erred in denying plaintiffs an injunction setting aside, annulling, suspending and perpetually enjoining the enforcement, operation and execution of said order of January 7, 1952.

6. The Court erred in failing to retain jurisdiction, stay its proceedings and remand the cause to the Interstate Commerce Commission for an administrative determination of the costs of transporting the vegetables for which the rates were prescribed in said order of January 7, 1952.

Wherefore, the said plaintiffs, The Baltimore and Ohio Railroad Company, et al., respectfully pray that the judgment and order of the District Court entered June 18, 1952, overruling plaintiffs' motion to stay and remand, sustaining defendants' motion to dismiss and dismissing the cause, be reversed, and that such other and appropriate relief be granted as to the Court may seem just and proper.

s/ Robert H. Bierma, H. D. Boynton, T. O. Broker,
J. P. Canny, Richmond C. Coburn, Frank H. Cole,
Jr., L. P. Day, R. B. Elster, R. J. Fletcher, James
B. Gray, Toll R. Ware, Attorneys for Plaintiffs.

Dated: July 3, 1952.

[fols. 168-169] Praecipe for Record (omitted in printing).

[fols. 170-176] Order Allowing Amended Praecipe
(omitted in printing).

[fols. 177-178] Amended Praecipe (omitted in printing).

[fols. 179-183] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 184] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 258

[Title omitted]

DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed August 8, 1952

Now come appellants, The Baltimore and Ohio Railroad Company, et al., in compliance with Rule 13, paragraph 9, of this Court, and request that the entire transcript of record upon appeal in the above-entitled proceeding be printed, omitting duplication.

Robert H. Bierma, Attorney for Appellants.

Dated: August 6, 1952.

[File endorsement omitted.]

[fols. 185-186] Certificate of Service (omitted in printing).

[fol. 187] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 258

[Title omitted]

APPELLANTS' STATEMENT OF POINTS TO BE RELIED UPON—
Filed August 8, 1952

Now come appellants, The Baltimore and Ohio Railroad Company, et al., in compliance with Rule 13, paragraph 9, of this Court, and state that they intend to rely upon each

of the points set out in the Assignment of Errors heretofore filed by the said appellants herein.

Robert H. Bierma, Attorney for Appellants.

Dated: August 6, 1952.

[File endorsement omitted.]

[fols. 188-191] Certificate of Service (omitted in printing).

[fol. 192] SUPREME COURT OF THE UNITED STATES, No. 258,
OCTOBER TERM, 1952

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—October 13, 1952

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

(4672)

Office - Supreme Court, U. S.
FILED

AUG 6 1952

CHARLES ELMORE CROFT
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 258

**LIBRARY
SUPREME COURT, U.S.**

**THE BALTIMORE AND OHIO RAILROAD COMPANY,
BOSTON AND MAINE RAILROAD, ERIE RAIL-
ROAD COMPANY, ET AL.,**

Appellants,

vs.

**UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION AND TEXAS CITRUS AND
VEGETABLE GROWERS AND SHIPPERS**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI**

STATEMENT AS TO JURISDICTION

**ROBERT H. BIERMA,
H. D. BOYNTON,
T. O. PROOKER,
J. P. CANNY,
RICHMOND C. COBURN,
FRANK H. COLE, JR.,
L. P. DAY,
R. B. ELSTER,
R. J. FLETCHER,
JAMES B. GRAY,
TOLL R. WARE,**
Counsel for Appellants.

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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION

Civil Action No. 8465(3)

THE BALTIMORE AND OHIO RAILROAD COMPANY; BOSTON
AND MAINE RAILROAD; ERIE RAILROAD COMPANY; GUY
A. THOMPSON, TRUSTEE OF MISSOURI PACIFIC RAILROAD COM-
PANY, NEW ORLEANS, TEXAS & MEXICO RAILWAY COM-
PANY, THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY
COMPANY, THE ST. LOUIS, BROWNSVILLE AND MEXICO
RAILWAY COMPANY, INTERNATIONAL-GREAT NORTHERN
RAILROAD COMPANY, SAN ANTONIO, UVALDE & GULF
RAILROAD COMPANY, AND SAN BENITO AND RIO GRANDE
VALLEY RAILWAY COMPANY; THE NEW YORK CENTRAL
RAILROAD COMPANY; THE NEW YORK, CHICAGO AND ST.
LOUIS RAILROAD COMPANY; THE NEW YORK, NEW HAVEN
AND HARTFORD RAILROAD COMPANY; THE PENNSYL-
VANIA RAILROAD COMPANY; ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY; ST. LOUIS SOUTHWESTERN RAIL-
WAY COMPANY OF TEXAS; TEXAS AND NEW ORLEANS
RAILROAD COMPANY; THE TEXAS AND PACIFIC RAILWAY
COMPANY; WABASH RAILROAD COMPANY, ON BEHALF OF
THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant,

AND

INTERSTATE COMMERCE COMMISSION AND TEXAS CITRUS
& VEGETABLE GROWERS AND SHIPPERS,

Intervening Defendants

**STATEMENT AS TO JURISDICTION OF THE SU-
PREME COURT OF THE UNITED STATES ON AP-
PEAL**

(Filed July 3, 1952)

In compliance with Rule 12 of the Supreme Court of the
United States, as amended, plaintiffs, The Baltimore and

Ohio Railroad Company, et al., having presented this day their petition for appeal, now file this their statement, particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the judgment and order of the United States District Court entered herein on June 18, 1952.

Nature of the Case under the Ruling of the District Court

This action was brought by plaintiffs, who are common carriers by railroad, to set aside, annul, suspend and enjoin an order of the Interstate Commerce Commission entered on the seventh day of January, A. D. 1952, in proceedings known as *Texas Citrus and Vegetable Growers and Shippers v. Atchison, T. & S. F. Ry. Co. et al.*, No. 30074 on said Commission's docket. Proceeding before the Commission was instituted by a complaint filed by Texas Citrus and Vegetable Growers and Shippers against designated railroads of the United States which participate in the transportation of vegetables from Texas to other states, alleging that the rates for said transportation were unreasonable, unduly preferential of vegetable growers and shippers in Arizona, California and New Mexico, and unduly prejudicial of vegetable growers and shippers in Texas. Said Commission found that the allegation of undue preference and prejudice had not been sustained, but found that existing rates on certain vegetables, from Texas to specified destinations in other states were, and for the future would be, unreasonable to the extent they exceed rates computed at certain percentages of a described class rate scale. The Commission entered an order on the 21st day of December, A. D. 1950, requiring the defendants in the proceeding, including each of the plaintiffs here, to cease and desist on or before April 7, 1951, from publishing, demanding or collecting rates which would exceed those prescribed for

future application and requiring the defendants to establish on or before April 7, 1951, and thereafter to maintain rates which would not exceed those found to be reasonable by said Commission.

On March 16, 1951, certain rail carriers, including plaintiffs here, filed a petition with said Commission setting forth their claim that said order of December 21, 1950, would confiscate the properties of all and each of them contrary to the Fifth Amendment to the Constitution of the United States and requesting a further hearing for the petitioning carriers to introduce evidence in proof of their claim. By order dated August 1, 1951, said Commission denied the petition for further hearing, thus refusing to afford the petitioning carriers an opportunity to present evidence of confiscation. However, the proceeding was reopened by the order of August 1, 1951, for reconsideration on the record as made.

On January 7, 1952, said Commission, five Commissioners dissenting and stating that the rates prescribed were too low, issued its further report and order upon reconsideration. The report of January 7, 1952, found that the existing rates on certain vegetables from Texas to specified destinations in other states were and for the future would be unreasonable to the extent they exceed rates computed on distance scales of rates set forth in an appendix to the report and increased by general increases authorized in *Increased Freight Rates, 1951* (Ex Parte 175), a general revenue proceeding. The order of January 7, 1952, ordered the defendants before the Commission, including the plaintiffs here, to cease and desist from publishing, demanding, or collecting rates which would exceed the maximum of reasonableness found in the report and to publish, maintain and apply for future transportation rates which would not exceed said maximum of reasonableness.

By petition dated February 15, 1952, certain rail carriers, including plaintiffs here, set forth their claim that the order of January 7, 1952, would confiscate the property of the petitioning carriers and each of them and offered to introduce evidence in proof of the claim if said Commission would grant a further hearing therefor. The petition was denied by an order dated March 7, 1952.

Believing said Commission had exceeded its powers in issuing the order of January 7, 1952, and that the rates prescribed by said order would confiscate the property of the rail carriers affected and each of them, plaintiffs filed their complaint against the United States of America to enjoin, set aside, annul, and suspend said order. Plaintiffs requested that a three-judge court be convened to hear their complaint and evidence of confiscation which said Commission refused to hear. The Interstate Commerce Commission and Texas Citrus and Vegetable Growers and Shippers intervened as parties defendant.

Motions to dismiss the complaint were filed by (a) United States and Interstate Commerce Commission and (b) Texas Citrus & Vegetable Growers and Shippers. Plaintiffs filed a motion to stay the proceedings before the three-judge court and to remand the case to said Commission for the administrative determination of the cost of service for which the rates were prescribed. In a judgment and order filed June 18, 1952, a copy of which is appended hereto, the specially constituted District Court overruled plaintiff's motion to stay and remand, sustained defendants' motions to dismiss, and dismissed the cause.

Statutes Conferring Jurisdiction

The judgment and order here appealed from was entered in the District Court of the United States for the Eastern

District of Missouri, Eastern Division, by a statutory court consisting of one Circuit and two District judges specially convoked to hear and determine the complaint herein to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission, pursuant to and by virtue of Sections 1336, 2321-2325 and 2284 of Title 28, U. S. Code, 62 Statutes 931, 969-970 and 968, and Section 1909 of Title 5, U. S. Code, 60 Statutes 243.

Jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment and order of the District Court entered in this case is conferred by 1253 and 2101(b) of Title 28, U. S. Code, 62 Statutes 928 and 962.

Cases Sustaining Jurisdiction

United States v. B. & O. R. Co., 333 U. S. 169; *New York v. United States*, 331 U. S. 284; *U. S. v. Hancock Truck Lines*, 324 U. S. 774; *B. & O. R. Co. v. United States*, 298 U. S. 349.

Statutes Involved

This appeal involves the validity of an order of the Interstate Commerce Commission entered on January 7, 1952, requiring plaintiffs here, among others, to cease and desist from publishing, demanding, or collecting rates in excess of those found to be a maximum of reasonableness and requiring plaintiffs here, among others, to establish and thereafter to maintain rates not in excess of those found to be a maximum of reasonableness. The order covers the rates on certain vegetables originating in Texas and transported by rail to destinations in certain other states of the United States, and was entered pursuant to the purported power under paragraph 1 of Section 15 of the Interstate Commerce Act, Sec. 15(1) of Title 49, U. S. Code, 41

Statutes 484-5, 48 Statutes 1102, 49 Statutes 543, 54 Statutes 911, which reads as follows:

“That whenever, after full hearing, upon a complaint made as provided in Section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.”

The Interstate Commerce Commission found existing rates to be unlawful under paragraph 5 of Section 1 of the

Interstate Commerce Act, Section 1, paragraph 5 of Title 49, United States Code, 54 Statutes 900, 63 Statutes 485, which reads as follows:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

The validity of said order of the Interstate Commerce Commission is attacked under the Fifth Amendment of the Constitution of the United States, which is as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Date of Judgment or Decree Sought to Be Reviewed and Date upon Which Application for Appeal Is Presented

The judgment and order sought to be reviewed was entered on the 18th day of June, A. D. 1952, by the District Court of Missouri, Eastern Division. The application for appeal was presented on the 3rd day of July, A. D. 1952.

The Questions Involved Are Substantial

The questions involved in this appeal are substantial. The judgment and order of the District Court dated June 18, 1952, in effect reverses long standing precedent, and if

allowed to stand, will cause a violation of plaintiffs' constitutional rights and ultimately effect important changes in procedure before the Interstate Commerce Commission and other regulatory bodies.

For many years, it has been established that parties can protect their constitutional rights against confiscation of their properties by timely asserting such a claim before the regulatory body in a petition for rehearing after the order of the regulatory body is entered. It has been held that parties, such as these plaintiffs, "were not bound in advance of the Commission's findings and report to set up a fear of transgression of their constitutional rights. Presumably, the Commission would keep within the law". *B. & O. R. Co. v. United States*, 298 U. S. 349, 370. Stated otherwise, if the constitutional issue was properly raised in a petition for rehearing, these plaintiffs are entitled as a matter of right to a hearing on the constitutional issue, and a judicial determination of it. See also *Lang Transp. Corporation v. United States*, 75 F. Supp. 915, 922 (footnote 5), where the principle is clearly stated and supported by numerous citations of authority of the Supreme Court.

This court in its judgment and order of June 18, 1952, does not follow this precedent but launches plaintiffs and all other parties who might be situated in similar circumstances into a new uncharted field. The court holds that railroads such as these plaintiffs, in every case before the Commission, must offer all evidence, including cost evidence of confiscation, if they are to protect their constitutional rights against confiscation. If such is not done, plaintiffs, according to this court, lose all rights to a judicial determination of the constitutional issue. The very statement of the principle indicates the changes—far-reaching in their effect—which would be worked in Commission procedure.

The District Court cites five opinions of the Supreme Court in support of its order to dismiss the complaint.

Three of these cases are distinguishable from the instant case. The other two cases cited support plaintiffs' position that the motion to dismiss should be denied and that the cause should have been remanded to the Interstate Commerce Commission for an administrative determination of railroad costs of operation.

What should have been the key to the Court's action was *B. & O. R. Co. v. United States*, 298 U. S. 349, and *New York v. United States*, 331 U. S. 284. The former case is distinguished by the Court from the instant situation by the statement that it involved divisions and "is not in point in this proceeding." What the court ignored was the fact that the *New York case*, which refers expressly to the *B. & O. case*, is to the same effect as the *B. & O. case* and that the *New York case* involves only rates and not divisions in the same manner as the instant case. If the *New York case* which is cited with approval in the court's opinion had been followed, this cause would have been remanded to the Commission for a determination of costs as prayed for in plaintiffs' motion to stay and remand. Thereafter, the Court would have held a hearing to determine finally the constitutional issue. This same *New York case* is cited with approval again in *Alabama Public Service Commission v. Southern Railway Company*, 341 U. S. 351, 348, another case upon which the opinion of the court relies. Moreover, *Manufacturers R. Co. v. United States*, 246 U. S. 284, another case relied upon by the court is cited and distinguished in both the *B. & O. case* and the *New York case*. The only other case cited in the opinion of the Court is *United States v. Capital Transit Company*, 338 U. S. 286, which case is not in point since the issue of confiscation was never raised before the Commission by a petition for rehearing or otherwise.

The issue here is confiscation. There is a sharp distinction between the "ordinary cases" referred to in the

Manufacturers Railroad case, and such a confiscation case. The basis to the difference is illustrated by the following taken from the *Baltimore & Ohio case* at page 364:

“There is a wide and fundamental difference between the question whether the commission, in prescribing divisions found by it to be just, reasonable and equitable, complied with the procedural requirements of the Act, and whether, if enforced against objecting carriers, the order will confiscate their property. The commission’s findings of fact in the field first mentioned, if based on evidence, are conclusive. But, upon the question whether prescribed divisions constitute just compensation within the meaning of the Fifth Amendment, Congress is without power conclusively to bind the carriers. As the Congress itself could not be, so it cannot make its agents be, the final judge of its own power under the Constitution. Congress has no power to make final determination of just compensation or to prescribe what constitutes due process of law for its ascertainment.

This fundamental difference between “ordinary cases” and a confiscation case was clearly recognized in *Lang Transp. Corporation v. United States*, 75 F. Supp. 915, 922 (footnote 5), where the court stated:

“Suits under the Urgent Deficiencies Act to set aside orders of the Interstate Commerce Commission are proceedings for judicial review upon the record before the Commission and are not trials de novo; hence evidence aliunde or de hors the record is inadmissible in the Federal District Court. *United States v. Louisville & Nashville R. Co.*, 1914, 235 U. S. 314, 35 S. Ct. 113, 59 L. Ed. 245; *Tagg Brothers & Moorehead v. United States*, 1930, 280 U. S. 420, 443-5, 50 S. Ct. 220, 74 L. Ed. 524; *Acker v. United States*, 1936, 298 U. S. 426, 434, 56 S. Ct. 824, 80 L. Ed. 1257; *National Broadcasting Co. v. United States*, 1943, 319 U. S. 190, 227, 63 S. Ct. 997, 87 L. Ed. 1344. There is an exception to

this rule where a claim of confiscation is made in a rate case; but even there correct practice requires that the evidence should be submitted in the first instance to the Commission. *Manufacturer's Railway Co. v. United States*, 1918, 246 U. S. 427, 489, 490, 38 S. Ct. 383, 62 L. Ed. 831; *St. Joseph Stockyards Co. v. United States*, 1936, 298 U. S. 38, 51-52; 56 S. Ct. 720, 80 L. Ed. 1033; *Baltimore & Ohio R. Co. v. United States*, 1936, 298 U. S. 349, 363, 369, 56 S. Ct. 797, 80 L. Ed. 1209."

The question which are here involved have previously been decided by the Supreme Court and we believe that this court has by its judgment and order erroneously departed from this long standing precedent. The questions presented are of great importance to the railroad industry and the public. Not only are the pecuniary interests of these plaintiffs seriously and adversely affected but long standing and previously established procedural practices could be disrupted by the court's judgment and order. Accordingly, it is submitted that substantial questions are involved which call for appropriate exercise of appellate jurisdiction.

Respectfully submitted,

(S.) ROBERT H. BIERMA,
H. D. BOYNTON,
T. O. BROKER,
J. P. CANNY,
RICHMOND C. COBURN,
FRANK H. COLE, JR.,
L. P. DAY,
R. B. ELSTER,
R. J. FLETCHER,
JAMES B. GRAY,
TOLL R. WARE,

Attorneys for Plaintiffs.

Dated: July 3, 1952.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION

Civil Action No. 8465 (3)

THE BALTIMORE AND OHIO RAILROAD COMPANY; BOSTON
AND MAINE RAILROAD; ERIE RAILROAD COMPANY; GUY
A. THOMPSON, TRUSTEE OF MISSOURI PACIFIC RAILROAD COM-
PANY, NEW ORLEANS, TEXAS & MEXICO RAILWAY COM-
PANY, THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY
COMPANY, THE ST. LOUIS, BROWNSVILLE AND MEXICO
RAILWAY COMPANY, INTERNATIONAL-GREAT NORTHERN
RAILROAD COMPANY, SAN ANTONIO, UVALDE & GULF
RAILROAD COMPANY, AND SAN BENITO AND RIO GRANDE
VALLEY RAILWAY COMPANY; THE NEW YORK CENTRAL
RAILROAD COMPANY; THE NEW YORK, CHICAGO AND ST.
LOUIS RAILROAD COMPANY; THE NEW YORK, NEW HAVEN
AND HARTFORD RAILROAD COMPANY; THE PENNSYL-
VANIA RAILROAD COMPANY; ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY; ST. LOUIS SOUTHWESTERN RAIL-
WAY COMPANY OF TEXAS; TEXAS AND NEW ORLEANS
RAILROAD COMPANY; THE TEXAS AND PACIFIC RAILWAY
COMPANY; WABASH RAILROAD COMPANY, ON BEHALF OF
THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant,

AND

INTERSTATE COMMERCE COMMISSION AND TEXAS CITRUS
& VEGETABLE GROWERS AND SHIPPERS,

Intervening Defendants

APPEARANCES:

Richmond C. Coburn, Toll R. Ware, James B. Gray and
Robert H. Bierma, Attorneys for Plaintiffs.

William V. O'Donnell, Asst. U. S. Atty., and Frank V.
Vesper, Special Asst. Atty. General, Attorneys for United
States.

A. Lee Pou, Attorney for Interstate Commerce Commission.

Frank A. Leffenwell and B. W. LaTourette, Attorneys for Texas Citrus & Vegetable Growers and Shippers.

Before THOMAS, Circuit Judge, MOORE and HARPER, District Judges.

HARPER, *Judge*:

APPENDIX "A"

Memorandum Opinion

This is a suit to enjoin, set aside, annul and suspend a certain order of the Interstate Commerce Commission, issued in a proceeding instituted by complaint of shippers under the Interstate Commerce Act, entitled "Texas Citrus and Vegetable Growers and Shippers vs. Atcheson, Topeka & Santa Fe Railway Company, et al., Docket #30,074." Sections 1336, 1398, 2284 and 2321-2325, Title 28, U.S.C., confer jurisdiction on this court in this matter.

The complaint before the Commission alleged that the rates and charges on fresh vegetables in carloads from origins in Texas to destinations in the United States other than Texas, were unreasonable, unduly prejudicial to vegetable growers and shippers in Texas, and unduly preferential of vegetable growers and shippers in Arizona, California and New Mexico. The complaint requested the Commission to prescribe rates for the future. The Commission by order of December 21, 1950, prescribed maximum rates on vegetables.

The carriers (plaintiffs here), on March 21, 1951, filed a petition for reconsideration and rehearing, and as the basis therefor claimed that the rates prescribed by the Commission were confiscatory, and if made effective would deprive them of their property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States, and sought opportunity to offer proof on this question. The Commission granted reconsideration on the record as made, but did not permit the submission of additional evidence. On January 7, 1952, the Commission issued its further report and order modifying the rates to some extent. On February 15, 1952, the carriers (plaintiffs here) again requested the Commission to grant a rehearing to afford the parties thereto an opportunity to offer proof in support of their averment that the rates prescribed in the order were confiscatory, which petition was denied by the Commission by its order dated March 7, 1952.

The plaintiffs brought this action seeking to restrain the enforcement of the order of the Commission dated January 7, 1952, and as grounds therefor allege that the refusal of the Commission to grant a rehearing as requested was and is arbitrary and capricious and an abuse of its discretion, contrary to the provisions of the Interstate Commerce Act and that the rates prescribed are confiscatory. The plaintiffs desire to present testimony before this court on that issue, but do not here contend that the rates are not just and reasonable based on the record.

The defendant, United States of America, and intervening defendants, Interstate Commerce Commission and Texas Citrus & Vegetable Growers and Shippers, have filed motions to dismiss. The plaintiffs have filed a motion to stay this cause, but with jurisdiction retained in the court, and to remand the cause to the Commission for the sole purpose of administrative determination by said Commission of the cost of transporting vegetables.

The question for the court is whether or not the plaintiffs have a right to a trial de novo at this stage of the proceedings on the question of confiscatory rates. One of the important elements in the determination of just and reasonable rates is cost of service, but the questions here is: When must such evidence be presented?

In dealing with the question of confiscatory rates the Supreme Court in *New York v. United States*, 331 U. S. 284, 1. c. 335, said:

“As stated in *Manufacturers R. Co. v. United States*, 246 U. S. 457, 489-490, and in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 53-54, correct practice requires that, where the opportunity exists, all pertinent evidence bearing on the issues tendered the Commission should be submitted to it in the first instance and should not be received by the District Court as though it were conducting a trial de novo.”

In *United States v. Capital Transit Company*, 338 U. S. 286, 1.c. 291, the Supreme Court said:

“It is also argued here that the orders should be set aside because they are confiscatory. But the

record fails to show that this issue was properly presented to the Commission for its determination. Therefore the question of confiscation is not ripe for judicial review."

And in *Alabama Public Service Commission v. Southern Railway Company*, 341 U. S. 341, i.e. 348, the court said:

"And, whatever the scope of review of Commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved."

In *New York v. United States*, *supra*, the District Court permitted the presentation of further evidence with respect to confiscation, but the Supreme Court said, i.e. 336:

"Thus we think that if the additional evidence was necessary to pass on the issue of confiscation, the cause should have been remanded to the Commission for a further preliminary appraisal of the facts which bear on that question."

In *Baltimore & Ohio Railroad Company v. United States*, 298 U. S. 349, testimony with respect to confiscation was permitted in the District Court and approved by the Supreme Court, but that case involved the division among carriers of the revenue resulting from admitted reasonable rates, and is not in point in this proceeding.

The complaint before the Commission dealt only with rates and the plaintiffs here were therefore on notice of the rates sought and were required to answer that complaint before the Commission. The plaintiffs here seek to relitigate a factual question involved in the proceeding before the Commission on which they initially elected not to present evidence. Cost of service has long been recognized as an important element in the reasonableness of any rate. The Supreme Court in *Manufacturers Railroad Company v. U. S.*, 246 U. S. 457, at pages 488 and 489, discussed the subject of confiscation and the presenting of evi-

dence on that question before the courts. At Page 489 the court said:

"Nevertheless, correct practice requires that, in *ordinary cases* (italics ours), and where the opportunity is open, all the pertinent evidence shall be submitted in the first instance to the Commission, and that a suit to set aside or annul its order shall be resorted to only where the Commission acts in disregard of the rights of the parties."

Rate cases such as this suit are among the ordinary cases referred to in the *Manufacturers Railroad* case, *supra*. The pertinent evidence bearing on the issue of confiscation should have been submitted to the Commission in the initial hearing, but was not. Such testimony will not be received by the District Court in this suit.

The plaintiff's motion to stay and remand is accordingly overruled, and the defendants' motion to dismiss is sustained, and the cause is ordered dismissed.

(S.) SETH THOMAS,
United States Circuit Judge.

(S.) GEO. H. MOORE,
United States District Judge.

(S.) ROY W. HARPER,
United States District Judge.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 258

LIBRARY
SUPREME COURT, U.S.

THE BALTIMORE AND OHIO RAILROAD
COMPANY, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, ET AL.,

Appellees.

**APPELLANTS' BRIEF IN OPPOSITION TO THE
MOTION TO AFFIRM FILED BY THE INTER-
VENOR, TEXAS CITRUS & VEGETABLE
GROWERS AND SHIPPERS.**

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Attorneys for Appellants

IN THE
Supreme Court of the United States

OCTOBER TERM, 1952.

NO.

THE BALTIMORE AND OHIO RAILROAD
COMPANY, ET AL.,

Appellants,

vs.

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Appellees.

**APPELLANTS' BRIEF IN OPPOSITION TO THE
MOTION TO AFFIRM FILED BY THE INTER-
VENOR, TEXAS CITRUS & VEGETABLE
GROWERS AND SHIPPERS.**

STATEMENT.

The intervenor, Texas Citrus & Vegetable Growers and Shippers (hereinafter termed "Texas"), here asserts by its motion to affirm that "the question on which the decision of this cause depends is so unsubstantial as not to need further argument." Neither the United States of America nor the Interstate Commerce Commission have filed motions to affirm the order of the United States District Court for the Eastern District of Missouri, Eastern Division.

This cause had its origin in a proceeding instituted before the Interstate Commerce Commission by the intervenor, Texas, and designated as Docket 30074. Assailed

before the Commission were the rates and charges on vegetables from the State of Texas to various destinations in the United States. The Commission by its order of December 21, 1950 prescribed maximum reasonable rates on certain vegetables for application in the future. Appellants thereafter timely filed a petition with the Commission for reconsideration and rehearing which included detailed statements showing that the rates prescribed, if made effective, would cause confiscation of appellants' property in violation of the Fifth Amendment to the Constitution of the United States. The record before the Commission, in accordance with usual practice, did not contain cost evidence necessary to a determination of the confiscation question. Appellants sought the opportunity on rehearing to offer such evidence in support of their claim of confiscation. The Commission did grant reconsideration on the record as made but denied the petition for rehearing. On January 7, 1952, the Commission issued its further report and order modifying its former findings "principally as to form." On February 15, 1952, appellants again requested the Commission by petition to grant a rehearing to afford appellants the opportunity to prove their claim of confiscation. This petition also was denied by the Commission on March 7, 1952. Thereupon, appellants filed their action in the District Court claiming that confiscation would result from the order of the Commission and sought its annulment.

Appellants conformed to the correct practice approved in *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, and, by their complaint, requested a judicial determination of the issue of confiscation. Appellants also stated their intention to offer evidence necessary for that determination which evidence the Commission had refused to hear by its denial of appellants' petitions. Also, in ac-

cordance with the practice stated to be proper in *New York v. United States*, 331 U.S. 284, 336, appellants subsequently filed a motion to stay the proceeding before the District Court and to remand to the Commission for the purpose of obtaining that agency's preliminary appraisal of evidence showing the costs of performing the service for which the rates were prescribed. Appellees contemporaneously filed motions to dismiss upon the grounds that the complaint failed to state a claim upon which relief would be granted. The District Court held that appellants had no right to a hearing where evidence of confiscation could be introduced after the issuance of the confiscatory order even though the issue of confiscation was raised seasonably before the Commission. Appellants' motion to stay and remand was denied. Appellants did not allege in their complaint that the evidence of record before the Commission showed the rates prescribed to be confiscatory but rather that evidence showing such confiscation would be produced for the District Court's judicial determination. The District Court denied appellants the right to introduce such evidence by its order to dismiss. The action of the District Court on both motions was predicated on its stated belief that appellants had no right to a hearing for the introduction of evidence at any time after the confiscatory order of the Commission was entered even though appellants had followed correct practice and raised the confiscation issue seasonably before the Commission.

The Question Presented.

The question presented on this appeal was stated by the court below in the following words:

The question for the court is whether or not the plaintiffs have a right to a trial *de novo* at this stage

of the proceedings on the question of confiscatory rates. One of the important elements in the determination of just and reasonable rates is cost of service, but the question here is: When must such evidence be presented?

Both the Commission and the District Court have denied appellants the right to present evidence in support of their contention that the prescribed rates were confiscatory. Appellants state that this denial is not only in conflict with controlling decisions of this Court but also that this denial effects a deprivation of appellants' constitutional rights.

ARGUMENT.

I.

Appellants' Right to a Judicial Determination of Their Claim of Confiscation.

Much of what is said in support of Texas' motion to affirm does not deal with the substantial question here presented. The position of Texas is apparently that, upon the basis of various rate comparisons, appellants could not prove their claim of confiscation in violation of their constitutional rights as a result of the order of the Interstate Commerce Commission in Docket 30074 even if appellants were permitted the opportunity to present evidence in support of their claim. Texas overlooks that the complaint alleges that the rates prescribed by the order of the Commission will yield revenue less than the costs of providing the service covered by said rates, an allegation which must be admitted for the purpose of the motions to dismiss. *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U.S. 123, 126. Further, the ability of appellants to prove their allegations is not the question presented by this appeal. As the District Court pointed out in its opinion, the question for the Court is whether or not appellants have a right to present evidence in the District Court in support of their claim of confiscation.

The Supreme Court has long held that the determination of the fact of confiscation is one for the courts. Typical of many of the decisions of the Supreme Court which have so held is *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51-52 where the following is stated:

But the Constitution fixes limits to the rate-making power prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny of determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards.

See also *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, 364; and *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 289. The effect of the order of the District Court is to deny appellants the right to a judicial review of their claim of confiscation. The District Court so held despite the fact that appellants did attempt in two petitions for rehearing before the Commission and in their complaint in the District Court to secure the opportunity to present evidence which would show the fact

of confiscation. Should the opinion of the District Court stand, it would work a reversal of long standing precedent that a litigant is entitled to a judicial determination of its claim of confiscation.

II.

Appellants' Conformance To "Correct Practice" In Raising Their Claim Of Confiscation.

The basis of the District Court's order was that appellants in a rate case must present their cost evidence in the initial hearings before the Commission prior to the issuance of a confiscatory order or else be forever foreclosed of their constitutional rights. This position was taken despite the fact that appellants in every way conformed to what had been described by the Supreme Court as being "practice appropriate and desirable" to raise this issue of confiscation. See *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, 371-372, and *New York v. United States*, 331 U.S. 284.

In both *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, and the instant case, a hearing was held before an examiner, a proposed report was issued, a final report was issued by the Commission, and thereafter, a petition was filed seeking reconsideration and rehearing upon the ground that the order of the Commission, if made effective, would cause confiscation of the appellants' property in violation of their constitutional rights. The Commission denied these petitions for rehearing. The District Court in *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, permitted the introduction of new cost evidence to show the fact of confiscation. The Supreme Court held that this was correct practice which was "appropriate and desirable as indicated in *Manufacturers' R. Co. v. United States*, 246 U.S. 457". Since appellants followed

this same approved practice, step by step, the District Court should have made a similar finding here.

The basis of the Supreme Court's finding, and what should have been the basis to the finding of the District Court is stated thus (298 U.S. 349, 370, 371-372):

They could not foresee that confiscatory restitution would be required or that confiscatory divisions would be prescribed; they were not bound, in advance of the commission's findings and report, to set up a fear of transgression of their constitutional rights. Presumably the commission would keep within the law.

. . . .

The appellants were not given and could not obtain a hearing before the commission upon the question of confiscation. Their failure earlier to invoke constitutional protection does not bar this suit. That they diligently sought relief from the commission is shown in the latter's brief here in which, justifying or explaining its denial of the second petition for rehearing, it says: "When the Commission denied the second petition, it already had before it and had considered the proffered evidence in support of the claim of confiscation that appellants desired it to consider, as well as the entire record of the previous hearings, much of the testimony in which consisted of cost calculations and other statistical data offered by the appellants." Appellants conformed to practice appropriate and desirable as indicated in *Manufacturers R. Co. v. United States*, 246 U.S. 457; 489, 62 L. ed. 831, 847, 38 S.Ct. 383, and recently expounded in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, ante, 1033; 56 S. Ct. 720.

Note the specific reference to *Manufacturers' R. Co. v. United States*, 246 U.S. 457, which is erroneously relied upon by the District Court in its opinion. Appellants here properly raised the confiscation issue in their petition for rehearing before the Commission in precisely the same

manner as was approved in *Baltimore & O. R. Co. v. United States*, 298 U.S. 349. The District Court should have permitted a hearing for the introduction of cost evidence by appellants in support of their claim of confiscation.

The District Court attempted to distinguish *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, on the ground that it involved divisions and for that reason was "not in point in this proceeding." But the statutory language defining the powers of the Commission in the establishment of both rates and divisions is virtually the same. See 49 U.S.C. §15(1) and §15(6); 41 Stat. 484-5, 48 Stat. 1102, 49 Stat. 543, 54 Stat. 911, and 41 Stat. 486. And this is confirmed by *Baltimore & O. R. Co. v. United States*, 298 U. S. 349, 357, where both rates and divisions for the purposes of confiscation are treated alike, the Court stating:

But this does not imply that, without regard to amount, the carriers are bound to accept prescribed divisions. *Congress is without power, directly or through the commission, to require them to serve the public at rates that are confiscatory. When made in accordance with the Act, the commission's orders prescribing divisions are the equivalent of Acts of Congress requiring the carriers to serve for the amounts specified.* Taken, as they must be, in connection with the duties to the public imposed by law upon the carriers, they command service and for that purpose appropriate the use of carriers' property (Emphasis supplied).

The distinction made by the District Court is not sound. Appellants did conform to correct practice in raising the issue of confiscation in their petitions for rehearing in which the opportunity to show the fact of confiscation was sought. Texas asserts in its motion that these petitions were not in accord with the General Rules of Practice

before the Interstate Commerce Commission. This contention was never made before the Commission and is not true.

New York v. United States, 331 U.S. 284, another case relied upon by the District Court, refers expressly to *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, without suggesting that there is any difference between a case involving rates and one involving divisions. In *New York v. United States*, 331 U.S. 284, this Court, just as it did also in *St. Joseph Stockyard Company v. United States*, 298 U.S. 38, treated *Manufacturers R. Co. v. United States*, 246 U.S. 457, as establishing the principle that a litigant in a rate case is entitled to an opportunity to present evidence on the issue of confiscation after the confiscatory order is entered. In fact, *New York v. United States*, 331 U.S. 284, establishes firmly that under present practice, the District Court should have remanded the cause to the Commission for the purpose of determining the administrative issue of costs in accordance with appellants' motion to remand. In that proceeding, new cost evidence was also tendered and received by the District Court on the issue of confiscation. The Supreme Court in reviewing this practice stated "that if the additional evidence was necessary to pass on the issue of confiscation, the cause should have been remanded to the Commission for a further preliminary appraisal of the facts which bear on that question" (p. 334). This is precisely what these appellants sought by their motion to stay and remand which was denied by the court below.

Alabama Public Service Commission v. Southern Railway Company, 341 U.S. 348, another case relied upon by the District Court is expressly grounded on *New York v. United States*, 331 U.S. 284. The only other case cited in

the opinion of the District Court is *United States v. Capital Transit Company*, 338 U.S. 286, which is not in point since in that case the issue of confiscation had not been properly raised before the Commission.

In the usual rate proceedings, before the Interstate Commerce Commission, evidence with respect to costs is not usually necessary and it is not the general practice to introduce such evidence. The Court knows from its observations in *New York v. United States*, 331 U.S. 284, 328, that the preparation, presentation and evaluation of such evidence is a task of real complexity. Should the order of the District Court stand and existing precedent be overruled, it will be necessary for litigants such as these appellants to introduce cost evidence in every rate proceeding before the Commission in order to safeguard their constitutional rights. If they do not do so, they will be forever foreclosed from asserting these rights. Such a general practice would greatly increase the burden of litigants, the public and the Commission.

Should the order of the District Court stand, it will work a reversal of long standing precedent of this Court that litigants such as these appellants can properly raise a claim of confiscation in court and submit evidence of confiscation which may not have been presented to the administrative body. Such would be the case even though litigants had in a timely and proper manner attempted to present evidence in support of their claim of confiscation to the administrative body immediately after the issuance of the confiscatory order. When such consequences might result there should be a full review by this Court of the District Court's order.

CONCLUSION.

Appellants submit that for the reasons there stated, the motion of Texas to affirm the order of the District Court should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1952.

No. 258

THE BALTIMORE AND OHIO RAILROAD COM-
PANY, BOSTON AND MAINE RAILROAD, ERIE
RAILROAD COMPANY, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION and TEXAS CITRUS
AND VEGETABLE GROWERS AND SHIPPERS.

Appeal from the United States District Court for the
Eastern District of Missouri.

**BRIEF FOR THE BALTIMORE AND OHIO RAILROAD
COMPANY, BOSTON AND MAINE RAILROAD,
ERIE RAILROAD COMPANY, ET AL.,
APPELLANTS IN NO. 258.**

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Supreme Court of the United States

OCTOBER TERM, 1952.

NO. 258

THE BALTIMORE AND OHIO RAILROAD COMPANY, BOSTON AND MAINE RAILROAD, ERIE RAILROAD COMPANY, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and TEXAS CITRUS AND VEGETABLE GROWERS AND SHIPPERS.

Appeal from the United States District Court for the Eastern District of Missouri.

**BRIEF FOR THE BALTIMORE AND OHIO RAILROAD COMPANY, BOSTON AND MAINE RAILROAD, ERIE RAILROAD COMPANY, ET AL.,
APPELLANTS IN NO. 258.**

OPINIONS BELOW.

The opinion of the specially constituted District Court of three judges (R. 145-149) is reported at 105 F. Supp. 631.

The initial report and the further report of the Interstate Commerce Commission (R. 9-47, 60-68) are reported at 279 I.C.C. 671 and 284 I.C.C. 206.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, U. S. Code, § 1253 and 2101(b), 62 Stat. 928, 961, 63 Stat. 104. The final decree of the District Court (R. 145-149) was entered June 18, 1952. The petition for appeal (R. 149-151) was filed July 3, 1952, and the order allowing appeal (R. 151-152) was entered on July 3, 1952. Probable jurisdiction was noted by this Court on October 13, 1952 (R. 155).

QUESTIONS PRESENTED.

1. Appellants did not raise the issue of confiscation in the initial hearings in a rate proceeding before the Interstate Commerce Commission, but did raise the issue as soon as the Commission by order prescribed rates alleged to be confiscatory, through the filing of petitions for reconsideration and further hearing. These petitions were denied and appellants brought suit in a specially constituted United States District Court to set aside the Commission's order on the ground that it was confiscatory. Are appellants entitled in that suit to a hearing on, and a judicial determination of the issue of confiscation?

2. In the circumstances stated, if appellants are entitled to a hearing on, and a judicial determination of, the issue of confiscation, is that hearing and determination to be limited to an appraisal of the evidence which was introduced in the initial hearings before the Commission, or are appellants entitled to a hearing before the Court on that evidence which the Commission declined to receive when it denied the petitions for reconsideration and further hearing?

3. In the circumstances stated, does correct practice require that the District Court remand the administrative

question of railroad costs of service to the Commission for its preliminary and expert appraisal?

STATUTES INVOLVED.

This appeal involves the following statutory and constitutional provisions which are set forth in full in the appendix hereto; Section 15(1) of the Interstate Commerce Act, Title 49, U.S. Code, § 15(1), 41 Stat. 484-485, 48 Stat. 1102, 49 Stat. 543, 54 Stat. 911; Section 1(5) of the Interstate Commerce Act, Title 49, U. S. Code, § 1(5), 54 Stat. 900, 63 Stat. 485; and the Fifth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE.

This cause had its origin in a proceeding instituted by the complaint of the appellee, Texas Citrus and Vegetable Growers and Shippers (hereinafter referred to as "Texas"), designated as No. 30074 on the docket of the Interstate Commerce Commission. Assailed as being in violation of Section 1(5) of the Interstate Commerce Act were the rates and charges published by appellants and other common carriers by railroad for application to vegetables transported from the State of Texas to various destinations in the United States. After a hearing, the issuance of an Examiner's proposed report to which both appellants and Texas filed exceptions, and oral argument, the Commission, four Commissioners dissenting, by its order of December 21, 1950, in purported exercise of its powers under Section 15(1) of the Interstate Commerce Act, prescribed maximum reasonable rates on certain vegetables for application in the future (R. 9-47).

Appellants thereafter filed a petition with the Commission for reconsideration and further hearing (R. 48-58) which petition included detailed statements showing that

the rates prescribed, if made effective, would produce revenues many hundreds of thousands of dollars less than their costs of operation and, thus, would cause confiscation of appellants' property in violation of the Fifth Amendment to the Constitution of the United States. Appellants sought the opportunity on further hearing to offer such evidence in support of their claim of confiscation (R. 50-51, 54-58). The Commission did grant reconsideration on the record as made but denied the petition for further hearing (R. 59). On January 7, 1952, the Commission issued its further report and order modifying its former findings "principally as to form," five Commissioners dissenting on the ground that the prescribed rates were "lower than the record warrants" (R. 60-68). On February 15, 1952, appellants again requested the Commission by petition to grant further hearing to afford appellants the opportunity to prove their claim of confiscation (R. 69-72). This petition was denied by the Commission on March 7, 1952 (R. 81). Thereupon, appellants filed their action in the District Court claiming that confiscation would result from the order of the Commission and seeking its annulment (R. 1-81).

Appellants, by their complaint, as amended, requested a hearing so as to permit a judicial determination of their claim of confiscation. Appellants stated in their complaint that the rates prescribed by the Commission would yield to the carriers affected thereby, including appellants, and to each of them, revenue less than the costs of providing the service covered by said rates (R. 7, 79). Appellants pointed out that such cost evidence did not exist in the record before the Commission, save as stated in appellants' petitions for reconsideration and further hearing (R. 6-7, 78). It was stated further that such cost evidence was not made a part of the record before the Commission

since appellants and other carriers "did not and could not foresee that confiscatory rates would be prescribed by the Commission in its orders" (R. 6-7, 78). But appellants also stated in their complaint that cost evidence necessary for the judicial determination of the issue of confiscation would be introduced in the hearing before the District Court (R. 8, 79-80).

Appellants, after the filing of their complaint, moved that the District Court stay its hand, and remand the cause to the Commission for the sole purpose of obtaining the Commission's preliminary and expert determination of the costs of performing the service for which the rates had been prescribed (R. 96-108).

Appellees contemporaneously filed motions to dismiss (R. 83-95).

The District Court thereafter denied appellants' motion to stay and remand and entered an order dismissing the complaint (R. 145-149).

The District Court held that the appellants were not entitled to introduce cost evidence before the court in support of the claim of confiscation. The court also denied the appellants' motion to stay the proceeding in the District Court and to remand the administrative question of railroad costs of service to the Commission for its preliminary and expert appraisal. The action of the District Court both in refusing to receive appellants' evidence and in overruling appellants' motion to stay and remand was based on the ground that the evidence bearing on the issue of confiscation "should have been submitted to the Commission in the initial hearing but was not." (R. 145-149). Appellants therefore have not had a hearing in any forum on, or a judicial determination of, the issue of confiscation. The case is here on direct appeal from the order of the District Court.

SPECIFICATION OF ERRORS.

Appellants rely upon all the errors assigned in their Assignment of Errors (R. 152-153). These errors are:

1. The Court erred in sustaining appellees' motions to dismiss.

2. The Court erred in overruling appellants' motion to stay and remand.

3. The Court erred in dismissing the cause.

4. The Court erred in concluding as a matter of law that appellants had no right to a hearing at which they could introduce evidence of confiscation after the Interstate Commerce Commission entered its order of January 7, 1952.

5. The Court erred in denying appellants an injunction setting aside, annulling, suspending and perpetually enjoining the enforcement, operation and execution of said order of January 7, 1952.

6. The Court erred in failing to retain jurisdiction, stay its proceedings and remand the cause to the Interstate Commerce Commission for an administrative determination of the costs of transporting the vegetables for which the rates were prescribed in said order of January 7, 1952.

SUMMARY OF ARGUMENT.

The complaint in the District Court alleged that the Commission's order would require the publication of rates which would produce for appellants and for each of them, "revenues less than the costs of providing the service covered by said rates" (R. 7, 79). This allegation, among others, must be taken as true on the motion to dismiss. *Anti-Fascist Committee v. McGrath*, 341 U. S.

123, 126. That appellants' costs are greater than the revenues produced by the prescribed rates thus establishes for the purposes of this proceeding the fact of confiscation of appellants' property. *Nor. Pac. R. Co. v. North Dakota*, 236 U. S. 585, 604.

The District Court, by its order of dismissal, thus admits the existence of confiscation for the purpose of this proceeding but would permit its continuance on the ground that "the pertinent evidence bearing on the issue of confiscation should have been submitted to the Commission in the initial hearing but was not" (R. 149). The District Court overlooks the allegations in the complaint that the evidence necessary to support the claim of confiscation was not a part of the record before the Commission. Appellants "did not and could not foresee that confiscatory rates would be prescribed by the Commission in its orders" (R. 6-7, 78). These facts must also be taken as true on the motion to dismiss.

The District Court by its order of dismissal has deprived appellants of their right to a hearing and judicial determination of the issue of confiscation to which they lawfully are entitled. *St. Joseph Stock Yards Company v. U. S.*, 298 U. S. 38, 51-52. The position of the District Court is premised upon the wrongful assumption that confiscation can only be proven upon the basis of facts contained in the initial record before the Commission even though correct practice had been followed before the Commission so as to preserve this issue for judicial determination. Where the sole issue presented was whether or not the order was confiscatory, it was not necessary that appellants even offer in evidence the initial record before the Commission. *Prendergast v. New York Teleph. Co.*, 262 U.S. 43, 50. Appellants' action in filing two petitions for reconsideration and further hearing with the Commission, (R. 48-58, 69-72), both of which were

denied by it (R. 59, 81), constituted "appropriate and desirable" practice for the preservation of the issue of confiscation after a hearing thereon for determination by the District Court. *B. & O. R. Co. v. United States*, 298 U. S. 349, 371-372.

The District Court discarded the precedent of *B. & O. R. Co. v. United States*, 298 U. S. 349, on the ground that it "involved the division among carriers of the revenue from admitted reasonable rates" and was not a rate case (R. 148). The distinction drawn by the District Court and its reliance placed upon *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 489, is not sound. The statutory language for Commission establishment by order of both rates and divisions is virtually the same. No distinction is drawn in *B. & O. R. Co. v. United States*, 298 U. S. 349, 357, between rate and divisions cases where confiscation is the issue.

Three other cases are relied upon by the District Court (R. 148). *Alabama Comm'n v. Southern R. Co.*, 341 U. S. 341, 348 is expressly grounded upon *New York v. United States*, 331 U. S. 284, 334-336. This latter case in turn refers expressly to *B. & O. R. Co. v. United States*, 298 U. S. 349, without suggesting therein that there is any difference between a case involving rates and one involving divisions. *United States v. Capitol Transit Co.*, 338 U. S. 286, cited by the District Court is not in point since in that case, the issue of confiscation had not been properly raised before the Commission.

New York v. United States, 331 U. S. 284, also cited by the District Court (R. 147-148), but relied upon in fact by appellants in support of their position, establishes firmly that under present practice, the District Court should have remanded the cause to the Commission for a preliminary appraisal of the evidence of costs in accordance with appel-

lants' motion to remand. In that proceeding, new cost evidence was also tendered and received by the District Court on the issue of confiscation. The Supreme Court in reviewing this practice stated "that if the additional evidence was necessary to pass on the issue of confiscation, the cause should have been remanded to the Commission for a further preliminary appraisal of the facts which bear on that question" (p. 334). This is precisely what these appellants sought by their motion to stay and remand which was denied by the court below.

The practice which appellants followed was "appropriate and desirable" in raising the issue of confiscation before the Commission. Appellants could not and did not, as alleged in their complaint, foresee that the Commission would exceed its authority in the prescription of confiscatory rates (R. 6-7, 78). Should the precedent of *B. & O. R. Co. v. United States*, 298 U. S. 349, be discarded in favor of the position taken by the District Court, a change in Commission procedure would necessarily result since the only method by which litigants such as these appellants could safeguard their constitutional rights would be through the introduction of cost evidence in all rate proceedings—a practice based upon the necessary assumption that the Commission will exceed its authority by the prescription of confiscatory rates. Such an assumption is directly contrary to the normal presumption that the Commission will not exceed its authority. Further, the position taken by the District Court, upon the motion to dismiss, necessarily assumes the establishment of confiscation, resulting from the Commission's order. Not only therefore does the order of the District Court result in the discard of sound precedent but it also permits the continuance of established confiscation without even the opportunity of a hearing for appellants. The District Court erred.

ARGUMENT.

I.

Final Determination of the Issue of Confiscation Resulting from an Order of the Interstate Commerce Commission Is a Judicial Question for the District Court.

This Court has long held that the determination of the issue of confiscation is one for the courts. Typical of many of the decisions of this Court which have so held is *St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38, 51-52 where the following is stated:

But the Constitution fixes limits to the rate-making power prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny of determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clear-

ly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards.

See also *New York v. United States*, 331 U. S. 284, 334-336; and *B. & O. R. Co. v. United States*, 298 U. S. 349, 364. In an exhaustive review of the precedents, including the applicable decisions of this court, the Supreme Judicial Court of Massachusetts has recently held that the issue of confiscation is a judicial question to be decided by the courts. *Opinion of the Justices*, Mass., 106 N.E. (2d) 259 (decided April 30, 1952).

The cases cited herein thus should assure appellants of the right to a judicial determination of the issue of confiscation. The effect of the order of the District Court is to deny appellants all opportunity to secure a hearing at which their claim of confiscation could be presented for such judicial determination. For the purposes of the motion to dismiss, the allegation of confiscation must be taken to be true. This means the judgment of the District Court sanctions the imposition of admittedly confiscatory rates and does so on the purely procedural and technical ground that the appellants should have raised the issue of confiscation in the initial hearing before the Commission. This result follows even though appellants, following correct practice did attempt in two petitions for reconsideration and further hearing, and in their complaint in the District Court to secure the opportunity to present evidence which would show confiscation resulting from the Commission's order. Should the opinion of the District Court stand, it will accomplish an unduly harsh result in its reversal of long standing precedent.

II.

Judicial Determination of the Issue of Confiscation Resulting to Appellants from the Commission's Order Is Not Limited to an Appraisal of the Evidence Which Was Introduced in the Initial Hearings before the Commission.

The District Court found that appellants should have introduced their evidence of confiscation at the initial hearings before the Commission and prior to the issuance of the allegedly confiscatory order. Since this was not done, appellants were found to be forever foreclosed of their constitutional rights. The District Court found in effect that its efforts were confined to the record taken at the initial hearings before the Commission (R. 149). In *Prendergast v. New York Teleph. Co.*, 262 U. S. 43, 50, this Court held that where the sole issue presented was whether or not the order was confiscatory, it was not necessary that appellants even offer in evidence the initial record before the Commission. The District Court took its position despite the fact that appellants in every way conformed to what had been described by this Court as being "practice appropriate and desirable" to raise the issue of confiscation and preserve it for Court review. See *B. & O. R. Co. v. United States*, 298 U. S. 349, 371-372, and *New York v. United States*, 331 U. S. 284, 334-336.

In both *B. & O. R. Co. v. United States*, 298 U. S. 349, and the instant case, hearings were held before an examiner, proposed reports were issued to which both parties filed exceptions, final reports were issued by the Commission, and thereafter, petitions were filed seeking reconsideration and further hearing upon the ground that the orders of the Commission, if made effective, would cause confiscation in violation of constitutional rights (R. 48-58, 69-72). The Commission denied the petitions for

further hearing (R. 59, 81). But the District Court in *B. & O. R. Co. v. United States*, 298 U. S. 349, when the order of the Commission was there attacked, permitted the introduction of new cost evidence at the hearing before it to show claimed confiscation so as to permit judicial determination of that issue. This Court held that this was proper and that the failure to invoke constitutional protection in the initial hearings before the Commission and prior to the issuance of the allegedly confiscatory order did not bar the suit. The Court held that the petitions which were filed for further hearing on the confiscation issue constituted practice which was "appropriate and desirable as indicated in *Manufacturers' Ry. Co. v. United States*, 246 U. S. 457" so as to preserve that issue on hearing for judicial determination. Since appellants followed this same approved practice, step by step, the District Court should have made a similar finding here.

The basis of the Supreme Court's finding, and what should have been the basis to the finding of the District Court is stated thus (298 U. S. 349, 370, 371-372):

"They could not foresee that confiscatory restitution would be required or that confiscatory divisions would be prescribed; they were not bound, in advance of the commission's finding and report, to set up a fear of transgression of their constitutional rights. Presumably the commission would keep within the law.

* * *

The appellants were not given and could not obtain a hearing before the commission upon the question of confiscation. Their failure earlier to invoke constitutional protection does not bar this suit. That they diligently sought relief from the commission is shown in the latter's brief here in which, justifying or explaining its denial of the second petition for

rehearing, it says: 'When the Commission denied the second petition, it already had before it and had considered the proffered evidence in support of the claim of confiscation that appellants desired it to consider, as well as the entire record of the previous hearings, much of the testimony in which consisted of cost calculations and other statistical data offered by the appellants.' Appellants conformed to practice appropriate and desirable as indicated in *Manufacturers R. Co. v. United States*, 246 U. S. 457, 489, 62 L. ed. 831, 847, 38 S. Ct. 383, and recently expounded in *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, ante, 1033, 56 S. Ct. 720."

Note the specific reference to *Manufacturers' Ry. Co. v. United States*, 246 U. S. 457, 489, which is erroneously relied upon by the District Court in its opinion. Appellants here properly raised the confiscation issue in their petitions for further hearing before the Commission in precisely the same manner as was approved in *B. & O. R. Co. v. United States*, 298 U. S. 349, 370-372. The District Court should here have permitted a hearing for the introduction of evidence by appellants in support of their claim of confiscation.

The District Court attempted to distinguish *B. & O. R. Co. v. United States*, 298 U. S. 349, on the ground that it involved divisions and for that reason was "not in point in this proceeding" (R. 148). But the statutory language defining the powers of the Commission in the establishment of both rates and divisions is virtually the same.* See 49 U.S.C. Sec. 15(1) and Sec. 15(6); 41 Stat. 1102, 49 Stat. 543, 54 Stat. 911, and 41 Stat. 486. And this is confirmed by *B. & O. R. Co. v. United States*, 298 U. S. 349, 357, where both rate and divisions cases for the purposes of confiscation are treated alike, the Court stating

* Rates: "just and reasonable"; divisions: "just, reasonable, and equitable".

“But this does not imply that, without regard to amount, the carriers are bound to accept prescribed divisions. *Congress is without power, directly or through the commission, to require them to serve the public at rates that are confiscatory. When made in accordance with the Act, the commission's orders prescribing divisions are the equivalent of Acts of Congress requiring the carriers to serve for the amounts specified.* Taken, as they must be, in connection with the duties to the public imposed by law upon the carriers, they command service and for that purpose expropriate the use of carriers' property (Emphasis supplied).

The distinction made by the District Court is not sound. No sound reason exists for a difference in court treatment between rate and divisions cases where the issue of confiscation has been properly raised before the Commission. Appellants did conform to correct practice in this rate case in raising the issue of confiscation in their petitions for further hearing in which the opportunity to show confiscation was sought.

New York v. United States, 331 U. S. 284, another case relied upon by the District Court, refers expressly to *B. & O. R. Co. v. United States*, 298 U. S. 349, without suggesting that there is any difference between a case involving rates and one involving divisions. In *New York v. United States*, 331 U. S. 284, 334-336, this Court, just as it did also in *St. Joseph Stock Yards Company v. U. S.*, 298 U. S. 38, treated *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, as establishing the principle that a litigant in a rate case is entitled to an opportunity to present evidence on the issue of confiscation after the confiscatory order is entered. In fact, *New York v. United States*, 331 U. S. 284, 334-336, establishes firmly that under present practice, the District Court should have

retained jurisdiction and remanded the cause to the Commission for the purpose of determining the administrative issue of costs in accordance with appellants' motion to remand. In that proceeding, new cost evidence was also tendered and received by the District Court on the issue of confiscation. The Supreme Court in reviewing this practice stated "that if the additional evidence was necessary to pass on the issue of confiscation, the cause should have been remanded to the Commission for a further preliminary appraisal of the facts which bear on that question" (p. 334). This is precisely what these appellants sought by their motion to stay and remand which was denied by the court below.

Alabama Comm'n v. Southern R. Co., 341 U. S. 341, 348, another case relied upon by the District Court is expressly grounded on *New York v. United States*, 331 U. S. 284, which has been discussed hereinbefore. The only other case cited in the opinion of the District Court is *United States v. Capital Transit Co.*, 338 U. S. 286, which is not in point since in that case the issue of confiscation had not been properly raised before the Commission.

The reliance of the District Court upon the cases cited hereinbefore and its lack of reliance upon the precedents of *B. & O. R. Co. v. United States*, 298 U. S. 349, and *New York v. United States*, 331 U. S. 284, produces unusual results. The complaint alleges that the Commission's order will require the publication of rates which will produce for appellants and each of them "revenues less than the costs of providing the service covered by said rates" (R. 7, 79). "Where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service after taking into ac-

count the entire traffic to which the rate applies, it must be concluded that the state has exceeded its authority." *Nor. Pac. Ry. Co. v. North Dakota*, 236 U. S. 585, 604. Since, upon a motion to dismiss, the allegations of the complaint must be taken as true, the fact of confiscation resulting from the establishment of the rates prescribed in the assailed order must be here accepted. *Anti-Fascist Committee v. McGrath*, 341 U. S. 123, 126. Nevertheless, the order of the District Court permits continuance of the Commission's order which for the purposes of this proceeding causes confiscation.

A second unusual result stems from the erroneous reliance by the District Court upon the precedent set forth in the opinion. Not only was it established in *B. & O. R. Co. v. United States*, 298 U.S. 349, 370, that appellants there could not foresee that the Commission would go without the law and require "confiscatory restitution", but appellants' inability here to foresee such results is again established as a matter of fact for the purpose of this proceeding. The complaint states that appellants "did not and could not foresee that confiscatory rates would be prescribed by the Commission in its orders" (R. 6-7, 78). These facts must be taken as true on the motion to dismiss. But following the reasoning of the District Court forward, in all proceedings before the Commission for the future, carriers such as these appellants must foresee in each case that the Commission might exceed its authority under the Constitution. Such an assumption certainly runs contrary to the usual presumption that the Commission will not exceed its authority.

In rate proceedings before the Commission, evidence with respect to costs is not usually necessary and it is not the general practice to introduce such evidence. The Court can note judicially from the 65th Annual Report of the

Commission to the Senate and House of Representatives dated November 1, 1951, that, for the year, the cost-finding section of the Commission performed work only "in connection with 35 formal proceedings before the Commission. This worked involved, in some cases, the preparation and introduction of evidence by members of this section, and in other cases the analysis of cost evidence submitted by other parties. Proceedings included charges on small shipments by railroads and motor carriers, express rates and charges, divisions of joint rates, commutation fares for railroads and bus carriers, switching charges, railway mail-pay rates, unloading charges on fruits and vegetables, and other matters involving rail, motor and barge rates on a variety of individual commodities (p. 78)." The Commission in the same year disposed of 502 formal cases arising out of complaint and suspension proceedings (p. 82). The reason for the very small amount of formal cases in which the introduction of costs required the services of the cost-finding section of the Commission is that "both the Commission and this Court have consistently rejected any thought that costs should be the controlling factor in rate making." *Alabama G.S.R.Co. v. United States*, 340 U.S. 216, 223. The Commission in a very recent case decided October 6, 1952, *Bus Fares Between New York City and New Jersey*, M.C.C. (I&S. M-4058), pointed out that "costs are useful in a determination of the lawfulness of fares but they are not indispensable to such a determination." Costs are thus neither controlling nor indispensable in rate making but costs are both controlling and indispensable in a determination of the issue of confiscation. The very issue presented by a

* The report also indicates that cost data for rate-making and related purposes were submitted to the suspension board in 776 motor and rail cases. These were merely administrative determinations of whether proposed rates or practices should be suspended under Section 15(7) of the Interstate Commerce Act pending a formal investigation and were not formal proceedings in which the Commission issued final orders.

claim of confiscation is whether or not an order of a regulatory body forces the carrier to transport a commodity "for less than the proper cost of transportation or virtually at cost". *Nör. Pac. Ry. v. North Dakota*, 236 U.S. 585, 604. Neither Congress nor its agent, the Commission, has the power to make a final determination of this issue of confiscation. *St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38, 52.

The Court knows further from its observations in *New York v. United States*, 331 U.S. 284, 328, and from this record (R. 97-99), that the preparation, presentation and evaluation of cost evidence is a task of real complexity. Should the order of the District Court stand, litigants such as these appellants must assume the burden of preparing such complex evidence of costs in every rate proceeding if they are to be fully protected from an invasion of their constitutional rights. Such procedure would obviously not be necessary in most cases but the threat of confiscation without judicial remedy would always be present. Appellants would be forced to assume under the principle adopted by the District Court that the Commission would exceed its powers and prescribe confiscatory rates. Such a practice if forced on appellants and others similarly situated would greatly increase the burden of all litigants, the public and the Commission. Should the order of the District Court thus stand, it will work a reversal of long standing precedent of this Court that litigants such as these appellants can properly raise a claim of confiscation in court and submit evidence of confiscation which may not have been presented to the administrative body. Such would be the case even though litigants had in a timely and proper manner attempted to present evidence to the Commission through petitions for reconsideration and further hearing in support of their claim of confiscation immediately after the issuance of the con-

fiscatory order. Such consequences therefore flow from a discard of the practice which was found to be appropriate and desirable in *B. & O. R. Co. v. United States*, 298 U. S. 349, 371-372.

That this appropriate and desirable practice does not lend itself to abuse is shown by the few cases thereafter in which the practice was followed. With no indication therefore of abuse arising from the practice deemed to be "appropriate and desirable" in *B. & O. R. Co. v. United States*, 298 U.S. 349, with the safeguard that it affords litigants such as these appellants against the serious consequences of an invasion of their constitution rights without effecting serious changes in Commission procedure, and with the full protection afforded to all parties by judicial direction and control, the practice which these appellants followed in raising the issue of confiscation for judicial determination should be deemed "appropriate and desirable" by this Court.

III.

In a Suit Brought in the District Court Attacking Rates Prescribed by the Commission as Confiscatory, Correct Practice Requires That the District Court Remand the Administrative Question of Railroad Costs of Service to the Commission for Its Preliminary and Expert Appraisal.

Appellants filed with the District Court a motion praying that the Court stay its hand, retain jurisdiction of the cause, and remand it to the Commission for the purpose of obtaining its preliminary and expert appraisal of the costs of railroad service (R. 96-107). The District Court denied this motion (R. 149). Appellees, the United States and the Interstate Commerce Commission, did agree at the hearing held on this motion before the District Court that, should the motion to dismiss be denied, appellants' motion to remand was proper (R. 117).

The basis in the main of appellants' motion to remand was *New York v. United States*, 331 U.S. 284, 334-336, where the following was stated:

The western roads in their petition for rehearing before the Commission raised the confiscation point. But in doing so they rested on the record before the Commission and tendered no additional evidence. In the District Court, however, they presented further evidence which was received over objection and considered by that court.

This, therefore, is not a case like *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, 363, 371, 372, 80 L. ed. 1209, 1221, 1225, 1226, 56 S. Ct. 797, where the Commission refused to receive evidence proffered on the point of confiscation. Here, as we have said, the Commission received all evidence that was offered; and when its order was announced and made known and the petition for rehearing was filed, the opportunity to tender additional evidence to bolster the confiscation point was not accepted. As stated in *Manufacturers R. Co. v. United States*, 246 U.S. 457, 489, 490, 62 L. ed. 831, 847, 848, 38 S. Ct. 383, and in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53, 54, 80 L. ed. 1033, 1042, 1043, 56 S. Ct. 720, correct practice requires that, where the opportunity exists all pertinent evidence bearing on the issues tendered the Commission should be submitted to it in the first instance and should not be received by the District Court as though it were conducting a trial *de novo*. The reason is plain enough. These problems of transportation economics are complicated and involved. For example, the determination of transportation costs and their allocation among various types of traffic is not a mere mathematical exercise. Like other problems in cost accounting, it involves the exercise of judgment born of intimate knowledge of the particular activity and the making of adjustments and qualifications too subtle for the uninitiated. Moreover, the impact of a particular order on revenues and the ability of the enterprise to thrive under it are matters for judgment on the part of those

who know the conditions which create the revenues and the flexibility of managerial controls. For such reasons, we stated in *Board of Trade v. United States*, 314 U.S. 534, 546, 86 L. ed. 432, 442, 62 S. Ct. 366:

"The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of facts that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems."

Thus we think that if the additional evidence was necessary to pass on the issue of confiscation, the cause should have been remanded to the Commission for a further preliminary appraisal of the facts which bear on that question.. (Emphasis supplied)

See also *General American Tank Car Corporation v. El Dorado Terminal Co.*, 308 U.S. 422, 432; and *Thompson v. Texas Mexican R. Co.*, 328 U.S. 134, 147.

The District Court should determine the constitutional issue of confiscation. But it is admitted that this issue, particularly when it involves the complexities of costs of railroad service, can place an undue burden upon the business of the court. This in particular was the subject of comment by Mr. Justice Brandeis in his concurring opinions in *St. Joseph Stock Yards Co. v. U. S.*, 298 U.S. 38, 84-93; and *B. & O. R. Co. v. United States*, 298 U.S. 349, 351-382, 387. It was for this very reason that this Court in *New York v. United States*, 331 U.S. 284, 334-336, held that a remand to the Commission for "a further preliminary appraisal of the facts" would have been proper. This procedure avoids the imposition of any burden upon the District Court and still preserves judicial review of the issue of confiscation. In *Opinion of the Justices*, Mass., 106 N.E. (2d) 259, 264-266, the Supreme

Judicial Court of Massachusetts, as did this Court in *New York v. United States*, 331 U.S. 284, 334-336, held that such procedure was proper in the safeguard of constitutional rights. Such a procedure removes any practical difficulties in the assumption by the Court of the admittedly difficult task of judicial determination of complex factual issues. The facilities of the Commission are readily available. Practicality and precedent thus support appellants' motion to stay and remand.

CONCLUSION.

The judgment of the District Court should be reversed and the cause remanded to that Court with directions to retain jurisdiction thereof so as to determine the issue of confiscation resulting from the Commission's order; and that the District Court further should be directed to remand in turn the cause to the Commission for the purpose of obtaining its preliminary and expert appraisal of railroad costs of service covering the rates of which annulment is sought.

Respectfully submitted,

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APPENDIX.

Section 15(1) of the Interstate Commerce Act, Title 49, U.S. Code, § 15 (1), 41 Stat. 484-485, 48 Stat. 1102, 49 Stat. 543, 54 Stat. 911, reads as follows:

“That whenever, after full hearing, upon a complaint made as provided in Section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist; and shall not thereafter publish demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the

maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.”

Section 1(5) of the Interstate Commerce Act, Title 49, U. S. Code, § 1(5), 54 Stat. 900, 63 Stat. 485, reads as follows:

“All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.”

The Fifth Amendment to the Constitution of the United States reads as follows:

“No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

DEC 27 1952

IN THE
Supreme Court of the United States

OCTOBER TERM, 1952.

No. 258

THE BALTIMORE AND OHIO RAILROAD COMPANY,
BOSTON AND MAINE RAILROAD, ERIE RAIL-
ROAD COMPANY, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION and TEXAS CITRUS AND
VEGETABLE GROWERS AND SHIPPERS.

Appeal from the United States District Court
for the Eastern District of Missouri.

**APPELLANTS' REPLY TO THE BRIEFS OF UNITED
STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION AND TEXAS CITRUS AND
VEGETABLE GROWERS AND SHIPPERS,
APPELLEES.**

ROBERT H. BIERMA,
H. D. BOYNTON,
T. O. BROKER,
J. P. CANNY,
RICHMOND G. COBURN,
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1952.

No. 258

THE BALTIMORE AND OHIO RAILROAD COMPANY,
BOSTON AND MAINE RAILROAD, ERIE RAIL-
ROAD COMPANY, ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION and TEXAS CITRUS AND
VEGETABLE GROWERS AND SHIPPERS.

Appeal from the United States District Court
for the Eastern District of Missouri.

**APPELLANTS' REPLY TO THE BRIEFS OF UNITED
STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION AND TEXAS CITRUS AND
VEGETABLE GROWERS AND SHIPPERS.
APPELLEES.**

I

**The Ultimate Question To Be Decided Is Whether
Appellants Are Entitled To A Judicial Hearing
On Their Claim Of Confiscation.**

Appellees take the position here that the ultimate ques-
tion to be decided is "whether the Commission abused
its discretion in denying the petition for rehearing" (U.S.
brief, pp. 2-3; Texas brief, pp. 1, 3-4).

Appellants submit that this is not a proper statement of the ultimate question here presented. Appellants did state in their complaint before the district court that "the refusal of the Commission to grant a rehearing as requested, was, and is, arbitrary * * * and an abuse of its discretion * * *" (R. 7, 78). But answers by appellees to this allegation of the complaint, or any other, have not been filed. The only hearings held by the district court were on appellees' motions to dismiss, and appellants' motion to stay and remand. Hence, appellants have had no opportunity to even submit evidence in support of their allegation. This allegation of the complaint is thus not in issue at this time. In the light of these circumstances, the failure of the district court to find that the Commission had abused its discretion could not be, and was not, made a part of appellants' specification of errors (R. 152-153).

For the purposes of this appeal, the question presented is that stated by the district court. (R. 147):

The question for the court is whether or not the plaintiffs have a right to a trial *de novo* at this stage of the proceedings on the question of confiscatory rates. One of the important elements in the determination of just and reasonable rates is cost of service, but the question here is: When must such evidence be presented?

In answer to this question, the district court found (R. 149):

Rate cases such as this suit are among the ordinary cases referred to in the *Manufacturers Railroad* case, *supra*. The pertinent evidence bearing on the issue of confiscation should have been submitted to the Commission in the initial hearing, but was not. Such testimony will not be received by the District Court in this suit.

The plaintiff's motion to stay and remand is accordingly overruled, and the defendants' motion to dismiss is sustained, and the cause is ordered dismissed.

Appellants' statement of the questions presented (appellants' brief, pp. 2-3), and the opinion of the district court, pose the ultimate question to be decided—are appellants entitled to a hearing at which evidence can be presented in support of their claim of confiscation?

II.

Appellants' Petitions For Further Hearing Were In Accord With The Commission's Rules Of Practice.

Both Texas and the Government urge that appellants' petitions for further hearing were not in accord with the Commission's rules of practice. Rule 101(b) requires that when a further hearing is sought, "the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced." The evidence which appellants offered to adduce was not cumulative since no evidence showing the relationship between appellants' costs of transportation and the revenues produced by the prescribed rates existed in the record before the Commission (R. 18). That allegation in the complaint is admitted to be true on the motions to dismiss.

The suggestion is also made on page 30 and in footnote 12 on page 20 of the Government's brief that the first petition of appellants for further hearing (R. 48-66) was not filed within the 60 day period "after service" of the order. While the order is dated December 21, 1950, (R. 9), it was not served on appellants until January 19, 1951.

Appellants' petition was filed March 16, 1951, well within the period contemplated by the rule (R. 48).*

Further, the explanation given to the Commission why such evidence was not previously adduced was proper. The basis to be prescribed was not known until the issuance of the Commission's report dated December 21, 1950 (R. 50). The final basis to be prescribed, after the reopening of the case for further consideration on August 1, 1951 (R. 59), was not known until the issuance of the Commission's report on January 7, 1952 (R. 60). The examiner's report dated March 9, 1950 (Appendix B to the brief of the Government) did not service notice upon appellants as to the basis to be prescribed since the Commission was free to depart, and did depart from his recommendations (R. 43-44). Both Texas and appellants took exceptions to this report (R. 10). This same contention that the examiner's report constituted notice of the basis to be prescribed was raised in *B. & O. R. Co. v. United States*, 298 U.S. 349, 370-371, and on the Commission's own objection, it was rejected, the Court stating:

Appellees do not claim that appellants were required to or could have raised the question of confiscation upon the proposed report of the examiners. That report is not a part of the record. At the trial appellants offered it in evidence. The commission objected to it on the ground that it is "a mere recommendation of an employee of the commission to the commission." The court sustained the objection. The report of the commission does not disclose the examiners' recommendations but states that its conclusions differ somewhat from those proposed by the examiners. For the reason given in the commission's objection, upon which the court excluded what the examiners proposed to the commission, the appel-

* The time period was 65 days. Rule 21(c) of the rules provides for an additional five day period over that stated in Rule 101 if parties to the proceeding are located in the far west. Parties in California were parties to the proceeding (R. 9).

lants would not have been justified in raising the question of confiscation upon the proposed report.

Still further, it should be pointed out, as the Government admits (U.S. brief, p. 19), that the examiner's recommended rates were higher than those prescribed by the Commission. Compare the Commission's findings (R. 43-44, 60-68) with the examiner's findings set forth in Appendix B to the brief of the Government. Whether or not the examiner's findings would result in confiscation, it is not possible, nor is it necessary, to consider here.

This leaves the proposal of Texas as the only alleged notice to appellants that confiscatory rates might be prescribed. It seems fair to state that if such a proposal constitutes notice to appellants and all carriers before the Commission, then appellants must presume that the Commission will exceed its authority and prescribe confiscatory rates. Stated otherwise, appellants cannot assume that an order of the Commission "is the product of expert judgment which carries a presumption of validity" (*Federal Power Commission v. Hope Gas Co.*, 320 U.S. 591, 602); appellants must always presume that the Commission will prescribe confiscatory rates. Such would be the case no matter how extreme a proposal might be suggested by a complainant if appellants were to secure complete protection of their constitutional rights. Only under such a presumption that the Commission would prescribe confiscatory rates, can it be argued that appellants did receive notice and should have presented their evidence of railroad costs. But such a presumption ignores the issues raised by a claim of unreasonableness under the statute and a claim of confiscation under the Constitution. Until the issue of confiscation is raised by an order of the Commission, costs are not controlling. Texas, the complainant before the Commission, states on page 13 of its brief that cost studies of the nature shown

in appellants' petition for further hearing were not even "relevant". See also appellants' brief, pp. 17-20.

Upon complaint, the Commission is authorized and empowered to determine and prescribe just and reasonable rates or the "maximum" or "minimum" rates to be charged (24 Stat. 384 as amended; 49 U.S.C. § 15(1)). "Maximum" and "minimum" rates differ by being on the extremes of the "zone of reasonableness within which a carrier is ordinarily free to adjust its charges for itself." *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 460-461. Texas in its complaint sought the prescription of "maximum" rates and such rates were purportedly prescribed (R. 10, 43-44, 63-64.) In *Alabama, G.S.R. Co. v. United States*, 340 U.S. 216, 223, a case involving the prescription of maximum joint rail-barge rates, it was stated that "both the Commission and this Court have consistently rejected any thought that costs should be the controlling factor in rate making." Similarly in a very recent case decided October 6, 1952, *Bus Fares—Between New York City and New Jersey* M.C.C. (I&S.M-4058), a maximum rate case, it was stated that "costs are useful in a determination of the lawfulness of rates but they are not indispensable to such a determination." Under the issues thus posed by the complaint of Texas, appellants' evidence of costs which was set forth in their petition for further hearing would have been neither controlling nor indispensable.

Even if the case before the Commission had been a "minimum" rate case, it has held that "minimum" rates may well be above the confiscatory level. Evidence of costs in such a case, although a minimum rate is obviously closer in level to a confiscatory rate, is neither indispensable nor controlling. See *Billets, Pig Iron, Scrap Iron—Ohio Transport, Inc.* M.C.C. (I&S.M-3539), decided July 24, 1952. See also *Tobacco, North Carolina*

Points to Southern Points (Rail), 273 I.C.C. 767, 774; and *Petroleum Products from Los Angeles to Ariz. and N. Mex.*, 280 I.C.C. 509, 516. Thus, when the Commission exercises its statutory powers either in a "maximum" rate case or in a "minimum" rate case, costs are neither indispensable nor controlling.

But in a determination of a confiscatory rate, costs are not only controlling but they are also indispensable. In no other way can the order be tested in order to determine whether the regulatory body has forced the carrier to transport a commodity "for less than the proper cost of transportation or virtually at cost," *Nor. Pac. Ry. v. North Dakota*, 236 U.S. 585, 604.

Under the circumstances stated, the petition of appellants stating that appellants "could not properly assume that the Commission would prescribe rates lower than the costs" to appellants of rendering the service constituted a valid explanation for their failure to supply such evidence prior to their petition for further hearing. (R. 51.) Costs are indispensable and controlling only when a confiscation issue is presented. Such an issue was not presented by the complaint before the Commission and the threat of confiscation was not raised until the Commission rendered its decision. Appellants did not sit back for periods of 18 months or 21 months as stated in the brief of the Government (pp. 19-20), and remain mute on the confiscation issue. There was, and could not be a confiscation issue until the Commission finally acted. And the delay of 18 months or 21 months as claimed by the Government cannot be ascribed to appellants.* Even

* The Examiner consumed 10 months of this time in the preparation of his report (U. S. brief, p. 48.) The Commission issued its first report 8 months thereafter (R. 9). Appellants' petition for further hearing was denied 7 months thereafter. The final report was issued 5 months later (R. 60).

if the confiscation issue had never been raised in the district court, this delay would have ensued through the workings of the Commission's own procedure.

Appellants are not claiming that the Record was stale and that this was the basis to their petitions for further hearing; appellants claim here that their petitions for further hearing were proper under the Commission's rules of practice and that their action constituted appropriate and desirable practice so as to insure judicial determination of the issue of confiscation in the district court. *B. & O. R. Co. v. United States*, 298 U.S. 349, 370-372. The petitions for further hearing did not request an opportunity to present additional evidence on the administrative issue relating to "maximum" rates; the petitions properly and timely raised the issue of confiscation and sought a hearing to present evidence on that issue when that issue was first raised by the issuance of the Commission's report and order.

III.

The Principles Of The B. & O. Case Are Sound.

The Government devotes a large part of its efforts toward partial reversal of *B. & O. R. Co. v. United States*, 298 U.S. 349 (U.S. brief, pp. 22-37). The Court is asked specifically "to re-examine *Baltimore & Ohio*, and to adopt the reasoning which led the four concurring Justices to the results in that case (U.S. brief, p. 23). The Government abandons entirely the basis upon which the district court avoided this precedent. The district court had held that the case was not in point since it involved divisions of rates (R. 148). Appellants agree with the Government that the district court's opinion is contrary to *B. & O. R. Co. v. United States*, 298 U.S. 349. Texas does not even cite this case in its brief or any of the cases cited by the district court in its opinion.

But the Government, while it puts much emphasis upon the concurring opinion in *B. & O. R. Co. v. United States*, 298 U.S. 349, 381-393, does not entirely disavow the majority opinion. This Court has not specifically discarded this precedent. In *New York v. United States*, 331 U.S. 284, 334, it is cited without any indication that the majority opinion no longer represents the views of this Court. Moreover, in this latter case, a specific method of procedure—that, followed by appellants in their motion to stay and remand (appellants' brief, pp. 20-23)—is outlined which, in reality, is simply a refinement of what was deemed appropriate and desirable practice in *B. & O. R. Co. v. United States*, 298 U.S. 349, 371-372. See also *Lang Transp. Corporation v. United States*, 75 F. Supp. 915, 922 (footnote 5), where a three judge district court stated:

Suits under the Urgent Deficiencies Act to set aside orders of the Interstate Commerce Commission are proceedings for judicial review upon the record before the Commission and are not trials *de novo*; hence evidence *aliunde* or *dehors* the record is inadmissible in the Federal District Court. *United States v. Louisville & Nashville R. Co.*, 1914, 235 U.S. 314, 35 S.Ct. 113, 59 L.Ed. 245; *Tagg Brothers & Moorehead v. United States*, 1930, 280 U.S. 420, 443-5, 50 S. Ct. 220, 74 L.Ed. 524; *Acker v. United States*, 1936, 298 U.S. 426, 434, 56 S.Ct. 824, 80 L.Ed. 1257; *National Broadcasting Co. v. United States*, 1943, 319 U.S. 190, 227, 63 S.Ct. 997, 87 L.Ed. 1344. There is an exception to this rule where a claim of confiscation is made in a rate case; but even there correct practice requires that the evidence should be submitted in the first instance to the Commission. *Manufacturers' Railway Co. v. United States*, 1918, 246 U.S. 457, 489, 490; 38 S.Ct. 383, 62 L.Ed. 831; *St. Joseph Stockyards Co. v. United States*, 1936, 298 U.S. 38, 51-52, 56 S.Ct. 720, 80 L.Ed. 1033; *Baltimore & Ohio*

R. Co. v. United States, 1936, 298 U.S. 349, 363, 369, 56 S.Ct. 797, 80 L.Ed. 1209. (Emphasis supplied.)

The existence of these precedents has perhaps influenced the Government in its only partial disavowal of the majority opinion in *B. & O. R. Co. v. United States*, 298 U.S. 349.

But practical considerations have apparently influenced the position of the Government. The Government states this in its brief at pages 35-36:

Appellants argue that the Commission's decision in this case would require the railroads to prepare complex cost studies in every rate reduction proceeding "if they are to be fully protected from an invasion of their constitutional rights." (Br. 19.) Such alarm, however, is groundless. In the first place, as appellants themselves admit (*ibid.*), such studies would "obviously not be necessary in most cases," since the issue of confiscation is likely to arise only in a small number of rate proceedings. Appellants themselves cite data showing that cost evidence "is not usually necessary" in rate cases before the Commission (Br. 17-18; cf. R. 125). Secondly—and more important—we do not contend that the carriers must offer cost evidence in response to a complaint which merely alleges that current rates are "unreasonable" and seeks the prescription of lower "reasonable" rates. The railroads' obligation to offer the evidence only arises when they are on notice of the precise rates sought. Since cost data are within the carriers' control, they are in the best position to determine whether the rates suggested appear sufficiently close to the confiscatory line to justify the preparation of cost studies. (Emphasis supplied.)

See also the brief of the Government at page 33. Therefore, if Texas had not offered a proposal for the establishment of certain rates—"notice of the precise rates sought"—appellants could properly, according to the Gov-

ernment, have advanced their claim of confiscation in the district court. *B. & O. R. Co. v. United States*, 298 U.S. 349, would, in such an instance, constitute a proper authority for the procedure followed by appellants. The Government seeks a discard of *B. & O. R. Co. v. United States*, 298 U.S. 349, only in those instances where a complainant before the Commission seeks Commission prescription of specific rates. In this connection, the Government does not point out that in the underlying proceedings before the Commission in *B. & O. R. Co. v. United States*, 298 U.S. 349, proposals were made by the parties in precisely the same manner as in this proceeding. See *Atlantic Coast Line R. Co. v. United States*, 194 I.C.C. 729, 735-738.

But the Government's distinction between those cases in which a proposal is offered, and those in which one is not, ignores entirely the fundamental difference between the issues presented by a maximum rate case and a ~~con~~ confiscation case. As pointed out earlier, costs are neither controlling nor indispensable in the former but are both controlling and indispensable in the latter. *B. & O. R. Co. v. United States*, 298 U.S. 349, is founded upon this distinction. Appellants here did not face any issue of confiscation until the Commission issued its final order of January 7, 1952, since appellants "could not foresee that confiscatory restitution would be required * * *". "Presumably the Commission would keep within the law" (p. 370). Once this issue was posed to appellants, appellants took prompt and proper action in the filing of petitions for further hearing—not on the issues raised by the complaint of Texas but solely on the new confiscation issue (R. 48-58, 69-72).

The Government cites numerous cases in support of its position that constitutional rights may be forfeited

by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it (U.S. brief, pp. 28-33). The Government concedes that "many of the cases dealing with waiver of constitutional rights through failure to make timely assertion relate to situations where the issue was not raised at all in the lower tribunal" (U.S. brief, pp. 30-31). But the Government overlooks the fact that timely assertion of appellants' constitutional rights was here made when the issue of confiscation was first raised by the issuance of the Commission's reports and orders. Here appellants pressed their constitutional objections at the earliest opportunity to do so.

In *Natural Gas Pipeline Co. v. Slattery*, 302 U.S. 300, 308-309, a utility sought to enjoin an order of the Illinois Commission which required that the utility open its records and furnish certain statistics for use in a rate proceeding pending before it. The claim was made that this was the "first step in the direction of unconstitutional action." The Court held that it could not assume that the Commission would arbitrarily make use of the statistics sought in fixing rates. The Court stated that there would be "time enough to challenge such action of the Commission when it is taken or at least threatened." Confiscation was not threatened here by the Commission or effected by the Commission until the final orders were issued. At the first opportunity after appellants became aware that the Commission had issued a confiscatory order, appellants challenged the order of the Commission. An earlier challenge by appellants on the grounds of unconstitutional action would have been premature. Appellants had the right to assume that the Commission would issue a valid order.

Certain of the cases cited by the Government call for special comment. Cited is *Alabama Commission v. South-*

ern Ry. Co., 341 U.S. 341, 348, and the bare statement of the Court that the limitation of judicial review "to the record taken before the Court presents no constitutional infirmity." The Government does not state that in the same paragraph, the Court pointed out that "a utility has no right to relitigate factual questions on the ground that constitutional questions are involved," and based its finding on *New York v. United States*, 331 U.S. 284, 334-336. The Court there stated that "if the additional evidence was necessary to pass on the issue of confiscation, the case should have been remanded to the Commission for a further preliminary appraisal of the facts which bear on that question." This is precisely what appellants sought in their motion to stay and remand.

Reference is also made to *United States v. Capital Transit Co.*, 338 U.S. 286. The Court refused there to determine the confiscation question since the question was "not ripe for judicial review." Here the question was properly presented to the Commission through the petitions for further hearing so that confiscation could be shown. The petitions were denied. The question of confiscation is ripe here for judicial review. No other forum save the court exists for such review.

Frequent references are made by the Government to *United States v. L. A. Tucker Truck Lines*,U. S. (No. 18, this term). In that proceeding, the issue—the qualifications of the hearing examiner under the Administrative Procedure Act—was presented at the moment that the examiner was assigned to the case, or at the moment he was seated at the bench. The Court stated that the examiner's appointment should have been challenged "before the examiner at the hearings and again before the Commission in a petition for rehearing." Here only the latter procedure was open to appellants and such

procedure was utilized in accordance with the rules of practice.

And finally, the Government makes the suggestion that appellants have a way "to challenge the new rates if after a fair test, they prove to be below the lowest reaches of a reasonable minimum" (U. S. brief, p. 32). Stated in support of this is *New York v. United States*, 331 U. S. 284, 340. So long as the present order is outstanding, appellants' only remedy is the filing of a petition for leave to file a further petition for reopening, rehearing, and reconsideration. Whether such a petition would be entertained is doubtful in view of the rule of the Commission that a "successive" petition filed by the same parties and "upon substantially the same grounds as a former petition which has been considered and denied by the entire Commission * * * will not be entertained" (Rule 101(f)). Since two petitions for further hearing have been already denied, it is doubtful if a third petition would be entertained. This leaves appellants without any remedy. And significantly, the Government in no manner denies that for the purposes of consideration of this case upon the motions to dismiss, the prescribed rates do not yield to appellants revenues sufficient to pay their costs.

IV.

Correct Practice Required That The District Court Remand The Case To The Commission To Take Additional Evidence.

Both the government and Texas also go into some detail as to facts stated in the report of the Commission. From this, Texas later asserts that the rates here assailed could not be confiscatory since they approximate, or are higher than other rates published by appellants and other carriers (Texas brief, pp. 14-20). The Government does not advance this contention. The facts stated by Texas are

not material here as indicated in *B. & O. R. Co. v. United States*, 298 U. S. 349, 379-380, where the following is stated:

Nor is there any force in appellees' suggestion to the effect that the evidence on which appellants seek to prove the prescribed divisions confiscatory would similarly condemn divisions that they accepted for a long time prior to the reduction of the joint rates November 9, 1928. As shown above, carriers advantageously to themselves and the public may and sometimes do apply rates and divisions that are lower than they could be compelled by law to accept.

The existence of these rates therefore does not constitute a bar either to a determination of appellants' claim of confiscation or to an order remanding to the Commission the determination of appellants' costs of operation.

The Government does "not disagree with appellants' contention that, if further cost evidence is to be received, it should be taken by the Commission rather than the district court" (U. S. brief, p. 37). Appellants dealt at length with this question in their brief (pp. 20-23). Ample authority exists in the precedents of this Court for such a course.*

But the Government suggests that this course should not be followed since appellants subsequent to the filing of their complaint have received a general increase in rates. The order of the Commission here complained of, that of January 7, 1952 (R. 64), expressly includes these increased rates by specific reference—"the general increases authorized in Ex Parte No. 173, *Increased Freight Rates*, 1951, 281 I.C.C. 557". A subsequent order dated April 11, 1952, in Ex Parte No. 175, *Increased Freight Rates* 1951, 284 I.C.C. 589, was issued. This later order modifies

* The suggestion is made in a footnote that the complaint does not adequately allege the claim of confiscation. The complaint is in full accord with Rule 8 of the Federal Rules of Civil Procedure. See *Sparks v. England*, 113 F. (2d) 579, 581.

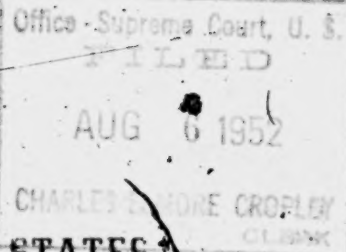
the prior order, and is just as much a part of the order here complained of, as was the prior order. It is these resultant rates which are assailed under the terms of the complaint (R. 7, 79, 127-128). There is nothing speculative about appellants' claim of confiscation. Appellants do not require a test period. Appellants seek the opportunity to show present confiscation. And for the purposes of this proceeding on the motion to dismiss, it must be taken that the assailed rates do not yield revenue sufficient to cover their costs.

CONCLUSION.

The judgment of the District Court should be reversed and the cause remanded to that Court with directions to retain jurisdiction thereof so as to determine the issue of confiscation resulting from the Commission's order; and that the District Court further should be directed to remand in turn the cause to the Commission for the purpose of obtaining its preliminary and expert appraisal of railroad costs of service covering the rates of which annulment is sought.

Respectfully submitted,

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TOLL R. WARE,
Counsel for Appellants.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 258

**LIBRARY
SUPREME COURT, U.S.**

**THE BALTIMORE AND OHIO RAILROAD COMPANY,
BOSTON AND MAINE RAILROAD, ERIE RAIL-
ROAD COMPANY, ET AL.,**

Appellants,

vs.

**UNITED STATES OF AMERICA, INTERSTATE COM-
MERCE COMMISSION AND TEXAS CITRUS &
VEGETABLE GROWERS AND SHIPPERS.**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI**

**MOTION OF TEXAS CITRUS & VEGETABLE
GROWERS AND SHIPPERS TO AFFIRM**

FRANK A. LEFFINGWELL,
Counsel for Appellee.

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION

Civil Action No. 8465 (3)

THE BALTIMORE AND OHIO RAILROAD COMPANY; BOSTON
AND MAINE RAILROAD; ERIE RAILROAD COMPANY; GUY
A. THOMPSON, TRUSTEE OF MISSOURI PACIFIC RAILROAD COMPANY;
NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY;
THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COM-
PANY; THE ST. LOUIS, BROWNSVILLE AND MEXICO RAIL-
WAY COMPANY; INTERNATIONAL-GREAT NORTHERN RAIL-
ROAD COMPANY; SAN ANTONIO, UVALDE & GULF RAIL-
ROAD COMPANY, AND SAN BENITO AND RIO GRANDE VAL-
LEY RAILWAY COMPANY; THE NEW YORK CENTRAL RAIL-
ROAD COMPANY; THE NEW YORK, CHICAGO AND ST. LOUIS
RAILROAD COMPANY; THE NEW YORK, NEW HAVEN AND
HARTFORD RAILROAD COMPANY; THE PENNSYLVANIA
RAILROAD COMPANY; ST. LOUIS SOUTHWESTERN RAIL-
WAY COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY
COMPANY OF TEXAS; TEXAS AND NEW ORLEANS RAIL-
ROAD COMPANY; THE TEXAS AND PACIFIC RAILWAY COM-
PANY; WABASH RAILROAD COMPANY, ON BEHALF OF THEM-
SELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

AND

Defendant,

INTERSTATE COMMERCE COMMISSION AND TEXAS CITRUS
& VEGETABLE GROWERS AND SHIPPERS,

Intervening Defendants

MOTION TO AFFIRM

Texas Citrus & Vegetable Growers and Shippers, an in-
tervening defendant herein, moves the Supreme Court to
affirm the order of June 18, 1952, in which the three-judge

statutory court dismissed the complaint herein. In support of this motion, it respectfully shows:

I

The question on which the decision of this cause depends is so unsubstantial as not to need further argument. The trial court had before it motions to dismiss on the ground that the complaint failed to state a cause of action. After argument by the parties, the court granted the motions to dismiss. The plaintiffs did not amend their pleadings but appealed the ruling to the Supreme Court. The sole question at issue is whether the trial court erred in sustaining the motions to dismiss. Plaintiffs claim that the Commission's order under attack was void because:

(a) The Commission was arbitrary, capricious and abused its discretion.

(b) The prescribed rates were, and are, confiscatory.

II. Arbitrary Action

The Commission held two hearings, one in Texas and one in California. All parties were given ample opportunity to submit evidence. A proposed report was served by the presiding examiner and exceptions were filed thereto. The case was then argued before the entire Commission. A final decision was rendered December 21, 1950. On March 16, 1951, the plaintiffs herein asked for reopening and further hearing to permit them to submit testimony they had not previously offered. They did not allege that evidence was newly discovered and they did not comply with the Commission's rules as to what must be shown to obtain a further hearing.

The Commission refused to grant a further hearing, based on the petition filed, but it did reconsider the case on the record and amended its previous decision. The trial

Court properly held that the facts reflected in the pleadings did not show that the Commission had abused its discretion. The Supreme Court should affirm that holding.

III. Confiscation

Paragraph X of the complaint alleged that the prescribed rates would yield revenues less than the cost of service but, other than general statements of that nature, plaintiffs alleged no facts which would constitute taking their property without due process of law. The mere statement that the Fifth Amendment has been violated is not sufficient.

But the exhibits attached to the complaint, and made a part thereof, contain many statements of fact that directly contradict the statement that the prescribed rates are "confiscatory". To illustrate:

As shown on page 677 of Ex. 1 of the complaint, the plaintiffs published rates in 1940 which yield substantially less revenue than the prescribed rates. Those rates had been increased 49 per cent, with a maximum of 42 cents per 100 lbs., at the time the Commission's second decision was issued. With those increases, the earnings per car are shown below at representative distances, compared with revenues under the prescribed rates.

Distance Miles	Voluntary Rates	Prescribed Rates
700	\$122.66	\$282.80
800	140.18	299.60
900	157.70	316.40
1000	175.22	333.20

NOTE: The above rates are now subject to a further increase of 15 per cent, with a maximum of 12 cents per 100 lbs.

The voluntary rates were published to retrieve traffic from the trucks and must be considered to be compensatory. If they yield more than out-of-pocket cost of transportation, the prescribed rates can not possibly be confiscatory. Those

voluntary rates have been given a good trial. They have remained in effect for 12 years, except for the general increases applied to all traffic since 1940.

Page 701 of Ex. 1 of the complaint gives information concerning present rates on five vegetables from California and Texas to various destinations. The prescribed rates are shown in Ex. 4. No reductions were prescribed on Cabbage, Onions and Potatoes. We show below examples taken from Exhibits 1 and 4 which reflect a comparison between rates and per-ton-mile revenue voluntarily published and applied from California and the prescribed rates here under attack:

Destination	Commodity	From California		From Texas			
		Present		Present		Prescribed	
		Rate (Cts)	PTM Rev (Mills)	Rate (Cts)	PTM Rev (Mills)	Rate (Cts)	PTM Rev (Mills)
Detroit, Mich.	Carrots	167	13.2	154	19.9	149	19.2
	Tomatoes	206	16.3	159	20.5	No change	
New York City	Carrots	192	11.9	172	17.2	167	16.7
	Tomatoes	217	13.5	188	18.8	182	18.2
Pittsburgh, Pa.	Carrots	175	12.7	158½	19.1	153	18.4
	Tomatoes	215	15.6	165	19.9	No change	

NOTE: All of the above rates are now subject to an increase of 15 per cent, with a maximum of 12 cts. per 100 lbs.

The California rates voluntarily published and continued for many years, except for general increases, can not be considered less than compensatory. The prescribed rates here under attack yield substantially greater revenue per ton mile than the voluntary rates from California. Normally, the rates applicable through the Rocky Mountains and west thereof should be 15 per cent higher than the rates in the territory east of the Rockies where the prescribed rates apply. See *Fresh Green Vegetables from Idaho and Oregon*, 253 I.C.C. 143, 149-150.

There are numerous other rates shown in Ex. 1 of the complaint indicating that the plaintiffs in this cause have

for twenty years or more voluntarily published and applied rates on vegetables that yield substantially less revenue per car mile and per ton mile than the prescribed rates here under attack. The court may assume that they would not voluntarily continue handling vegetable shipments all of those years at rates yielding confiscatory revenue. Those facts, all of which are contained in the pleadings, completely negative the allegation that the prescribed rates are confiscatory. This complaint is similar to one seeking to collect a debt from a man alleged to owe the plaintiff \$50.00 though the pleadings show that the plaintiff owes the same man \$100.00.

In granting motions to dismiss the trial court did not abuse its discretion. If plaintiffs have a cause of action, their remedy is to amend their pleadings so as to allege a cause of action.

Wherefore, the Texas Citrus and Vegetable Growers and Shippers respectfully moves that the decision and order of the trial court be in all things affirmed.

Respectfully submitted,

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1515 Praetorian Building,
Dallas 1, Texas.
Attorney for Intervening Defendant.

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CHARLES W. WHITNEY

No. 258

In the Supreme Court of the United States

OCTOBER TERM, 1952

**THE BALTIMORE AND OHIO RAILROAD COMPANY,
ET AL., APPELLANTS**

v.

**THE UNITED STATES OF AMERICA, INTERSTATE
COMMERCE COMMISSION, ET AL.**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI**

**BRIEF FOR THE UNITED STATES AND THE INTERSTATE
COMMERCE COMMISSION**

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 258

THE BALTIMORE AND OHIO RAILROAD COMPANY,
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v.

THE UNITED STATES OF AMERICA, INTERSTATE
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

BRIEF FOR THE UNITED STATES AND THE INTERSTATE
COMMERCE COMMISSION

OPINION BELOW

The opinion of the district court (R. 145-149) is reported at 105 F. Supp. 631. The report of the Interstate Commerce Commission. (R. 9-44) is reported at 279 I. C. C. 671. The report of the Commission on reconsideration (R. 60-65) is reported at 284 I. C. C. 206.

JURISDICTION

The final judgment of the three-judge district court was entered on June 18, 1952 (R. 146, 149).

The petition for appeal was allowed on July 3, 1952 (R. 151-152), and this Court noted probable jurisdiction on October 13, 1952 (R. 155). The jurisdiction of this Court is conferred by 28 U. S. C. 1253 and 2101 (b).

QUESTIONS PRESENTED

A complaint filed with the Interstate Commerce Commission on behalf of shippers attacked existing freight rates as "unjust and unreasonable," and asked the Commission to prescribe "just and reasonable" rates. During the hearings complainant proposed specific rates. The carriers introduced some evidence relating to costs, but did not offer any general over-all cost study, either at the hearings or during the 18 months between their closing and the decision of the Commission. The Commission prescribed rates which were lower than those in existence but higher than those requested by complainant. Three months after the Commission's decision the carriers filed a petition for rehearing in which, for the first time in the proceedings, they alleged that the rates were confiscatory, and sought leave to offer cost studies in support of that contention. The Commission denied the petition. The questions presented are:

1. Whether the Commission abused its discretion in denying the petition for rehearing.
2. If the answer to question 1 is "No," whether the district court correctly refused to remand the

case to the Commission to receive the railroads' additional cost evidence.

STATUTE INVOLVED

Pertinent provisions of the Interstate Commerce Act are set forth in Appendix A, *infra*, pp. 44-47.

STATEMENT¹

The proceeding was instituted by a complaint filed with the Interstate Commerce Commission on September 13, 1948, by Texas Citrus and Vegetable Growers and Shippers² against a number of railroads serving Texas (R. 9-10). The complaint alleged that the carload rates on vegetables from Texas to points outside Texas were unreasonable in violation of Section 1 of the Interstate Commerce Act, 24 Stat. 379; as amended, 49 U. S. C. 1, *et seq.*, and unduly prejudicial to Texas growers and shippers and unduly preferential of growers and shippers in Arizona, California and New Mexico in violation of Section 3 (R. 4-5, 10). The gravamen of the complaint was that the rates from Texas were higher than the comparable rates

¹ The record of the proceedings before the Commission is not a part of the record on appeal in this case, since the Government made its motion to dismiss before the record of the Commission's proceedings was filed with the district court. Certain of the pleadings and orders in the Commission proceedings, however, were attached to appellant's complaint, and are a part of the record on appeal. The factual statements herein are, as far as we know, undisputed.

² A membership corporation whose members are Texas vegetable growers and shippers (R. 82).

from Arizona, New Mexico and California (R. 11-12). The complaint requested the Commission to prescribe lawful rates for the future (R. 5, 10).

Hearings on the complaint were held in Harlingen, Texas, and Los Angeles, California, in June 1949 (R. 84, 90). During the four days of hearings, 115 exhibits, many of great length, were introduced, and more than 600 pages of testimony were taken (R. 84, 90, 121). Detailed evidence was introduced relating to the movement of a number of different vegetables from Texas and from Arizona, California and New Mexico to numerous points throughout the country. This evidence related to the volume and frequency of such shipments (R. 12-14, 19, 22, 24-26, 28, 37-38), the distances involved (R. 13, 23-25, 27, 40), the rates at which the shipments moved³ (R. 15-17, 21, 23-25, 27-28, 41), the wholesale selling prices of the vegetables (R. 19-20, 22, 27), the competitive situation between the Texas and the western producing areas (R. 33-34), and competition between railroads and trucks (R. 34-35).

The railroads introduced evidence relating to alleged higher costs on perishable freight, in-

³ The carload rates on vegetables from Texas to various destinations were based on the application of varying percentages of the first class rates (R. 15). *Southwestern Vegetable Case*, 200 I. C. C. 355, 209 I. C. C. 606, 214 I. C. C. 63. The rates were figured in cents per hundred pounds, with different minimum weights for particular commodities (R. 15).

cluding vegetables, resulting from the need to use refrigerator cars and to meet schedules (R. 30). They also introduced evidence purportedly showing high loss and damage claims incurred in the transportation of vegetables* (R. 30-31). The railroads did not, however, offer or introduce any general evidence relating to their costs of transporting the Texas vegetables involved in the proceeding.

During the course of the hearings, the complainant proposed specific rates in lieu of the rates then in effect (R. 17-18, 27, 91, 124).

The examiner filed a proposed report (R. 10) in which he recommended rates which were below those then in effect but higher than those suggested by complainant (R. 113).⁴ Exceptions to the examiner's report and requested findings were filed by the participants in the proceedings, and oral argument was held before the full Commission (R. 10, 84, 91, 119). . Neither in their exceptions nor during the argument did appellants urge that either the rates suggested by complainants or those proposed by the examiner were confiscatory, nor did they seek leave to reopen the hearing to introduce additional evidence relating to their costs.

⁴The examiner's report, which is a public document of the Commission, is not a part of the record on appeal. Pertinent portions of the report are set forth in Appendix B, *infra*, pp. 48-51.

On December 21, 1950, the Commission issued its first report in the proceedings.⁵ The Commission found that certain of the rates on vegetables from Texas were unreasonable (R. 43-44). The Commission further found that, although the Texas rates were relatively higher than those from California and Arizona, the allegation of undue prejudice and preference had not been sustained because of the absence of "persuasive evidence" as to the "specific effect" of the discrepancies "on complainant's members' ability to sell in those markets" (*ibid.*).

In its report, the Commission made extensive findings relating to all aspects of the movement of vegetables from Texas (see *supra*, p. 4). The Commission considered the railroads' evidence relating to the alleged higher costs of transporting vegetables because of the need to move them in refrigerator cars and to meet shipping schedules, but concluded that there was no evidence that these conditions "are peculiar to the vegetable traffic from Texas" (R. 30). It also examined the evidence relating to the railroads' contention that loss and damage claims on the Texas traffic were "much higher" than in previous years (*ibid.*), but found that this claim was not sustained by the record (R. 31).

⁵ Four Commissioners joined in the report. Two Commissioners joined in a brief concurring opinion, and one Commissioner filed a brief opinion concurring in part. Four Commissioners dissented without opinion. (R. 44.)

The Commission entered an order directing the railroads to put new, lower rates into effect by April 7, 1951 (R. 46-47). The new rates were somewhat lower than those recommended by the examiner, but higher than those requested by complainant (R. 91, 120).

On March 19, 1951 (R. 69)—approximately three months after the Commission had issued its report and order, and 21 months after the hearings had closed—appellant railroads filed a petition for “further hearing and reconsideration” (R. 48). They alleged that the new rates prescribed by the Commission were “less than the costs of providing the service covered by the rates” and were “confiscatory of the property of petitioners, and of each of them” in contravention of the Fifth Amendment of the Federal Constitution (R. 50). The railroads stated that if a further hearing were granted, they would introduce evidence “to show that the costs to them of providing the service covered by the rates prescribed by said order of December 21, 1950, are substantially in excess of such rates * * *” (R. 51). They further alleged that the cost evidence they desired to introduce “was not available to them at the time of the prior hearings” (*ibid.*), and that their previous failure to introduce cost-of-service evidence did not foreclose them from introducing it at a further hearing because they “could not properly assume that the Commission would pre-

scribe rates lower than the costs to defendants of rendering the service" (*ibid.*). Attached to the petition were several appendices (R. 54-58) setting forth statistical data described as "generally indicative" of the cost evidence which the railroads sought to introduce to show that the new rates did not cover the cost of service (R. 51).

On August 1, 1951, the Commission denied the request for a further hearing (R. 61), but reopened the proceeding "for reconsideration on the record as made" (R. 59). On reconsideration, the Commission modified some of its prior findings "principally as to form" (R. 60)⁶ in order to clarify certain of the prescribed rates (R. 63).⁷ In general, however, the rates were substantially the same as those previously determined (*ibid.*). In its report, the Commission noted that the rail-

⁶ The Commission did, however, make certain changes in the substance of its decision. In its original decision the Commission had found that the west-bound rates from Texas to points in California and Arizona were "substantially higher" than the east-bound rates from those points to Texas (R. 37), and that there was no showing of transportation conditions sufficient to justify the discrepancy (R. 38). The Commission accordingly ordered that such west-bound rates should not exceed the east-bound ones (R. 47). On reconsideration, however, the Commission "reexamined the evidence" on this issue (R. 63), and concluded that the record was inadequate to permit the prescription of maximum reasonable west-bound rates (R. 63-64).

⁷ Five Commissioners dissented on the ground that the new rates were "lower than the record warrants" (R. 64). None of the dissenting Commissioners, however, disagreed with the Commission's denial of a further hearing.

roads' petition did not "point to any lack of support in the record for the findings made in our prior report" (*ibid.*). The Commission stated that the general freight rate increases authorized by it in *Ex Parte 175, Increased Freight Rates, 1951*, 281 I. C. C. 557,⁸ could be added to the rates prescribed (R. 64).⁹

The railroads then brought this action in the United States District Court for the Eastern District of Missouri to set aside and enjoin en-

⁸ In the *Ex Parte 175* case referred to by the Commission, decided August 2, 1951, a 6% general increase (maximum 6 cents per hundred pounds) was allowed on the rates involved in this case. 281 I. C. C. 557, 640-641. On April 11, 1952, the Commission granted a further general rate increase in *Ex Parte 175* which, together with the increase previously allowed, resulted in a total increase of 15% in the rates prescribed by the Commission in the case at bar, subject to a maximum increase of 12 cents per hundred pounds. 284 I. C. C. 589, 662.

⁹ The Commission's order on reconsideration, issued on January 7, 1952, directed the railroads to establish the new rates by April 24, 1952 (R. 67-68). In response to a petition by complainant to advance the effective date thereof to March 15, 1952 (R. 69), the railroads petitioned the Commission to "reopen this proceeding for further hearing to receive cost evidence which would show the confiscatory nature of the prescribed rates," and to postpone the effective date of the order (R. 71). Both petitions were denied by the Commission on March 7, 1952 (R. 81). On March 11, 1952, the Commission postponed the date for establishment of the new rates to June 23, 1952 (R. 75). The order of the district court dismissing the railroads' petition to set aside the order was entered on June 18, 1952 (R. 146, 149). An application for a stay of the Commission's order was denied by Mr. Justice Clark on July 16, 1952, and the lower rates were put into effect shortly thereafter.

forcement of the Commission's order of January 7, 1952. The amended complaint (R. 73-80) alleged that the Commission's refusal to grant a rehearing and permit introduction of cost evidence was "arbitrary and capricious" and an abuse of discretion in violation of Section 17 (6) of the Interstate Commerce Act, and deprived the railroads of their property without due process of law in violation of the Fifth Amendment (R. 78). The complaint stated that at the hearing before the court the railroads would introduce the cost evidence "which the Commission refused to hear" (R. 79).

Motions to dismiss were filed by the Government (R. 94) and by the complainant (R. 83), which had intervened in the court proceedings (R. 82-83). The motions alleged that the complaint failed to state a cause of action. The railroads then filed a motion requesting the court to stay the cause but retain jurisdiction, and to remand the proceedings to the Commission "for the sole purpose of an administrative determination" by the Commission "of the costs of transporting [the] vegetables [involved]" (R. 96).

After hearing argument (R. 108-144) the district court granted the Government's and complainant's motions to dismiss, denied the railroads' motion to remand, and dismissed the complaint (R. 149). The court held that the railroads were not entitled to a trial *de novo* on the issue of confiscation at this stage of the

proceedings (R. 147). Noting that the railroads "do not here contend that the rates are not just and reasonable based on the record" (R. 147), the court stated (R. 148-149):

The complaint before the Commission dealt only with rates and the plaintiffs here were therefore on notice of the rates sought and were required to answer that complaint before the Commission. The plaintiffs here seek to relitigate a factual question involved in the proceeding before the Commission on which they initially elected not to present evidence. Cost of service has long been recognized as an important element in the reasonableness of any rate.

* * * The pertinent evidence bearing on the issue of confiscation should have been submitted to the Commission in the initial hearing, but was not. Such testimony will not be received by the District Court in this suit.

SUMMARY OF ARGUMENT

I

A. Appellants' petition for rehearing did not make an adequate explanation as required by the Commission's Rules of Practice, as to "why such [additional] evidence was not previously offered." The petition did not state that the evidence was newly discovered, or that it related to a change in economic conditions. It merely alleged that appellants could not foresee that

the Commission would prescribe rates claimed by appellants to be lower than the cost of rendering the service.

During the hearings, complainant announced the rates which it was seeking. The examiner recommended rates lower than those in effect. When the Commission handed down its decision, appellants had been on notice for 18 months of the rates which the Commission was being asked to prescribe as just and reasonable. At no time during that period, however, did appellants endeavor to present their cost evidence to the Commission. This Court has consistently held that the granting of a rehearing is a matter within the Commission's discretion. *Interstate Commerce Commission v. Jersey City*, 322 U. S. 503, 515-518. The Commission did not abuse its discretion in denying a rehearing in this case.

B. The fact that the petition for rehearing alleged that the rates were confiscatory did not require the Commission to depart from its usual rules of practice and grant a rehearing. Appellants rely on the majority opinion in *Baltimore & Ohio Railroad Co. v. United States*, 298 U. S. 349. We believe, however, that the concurring opinion of Mr. Justice Brandeis (joined in by Justices Stone, Roberts and Cardozo) in that case—rejecting the majority view upon which appellants rely—states the rule which should be applied here. We respectfully urge the Court to reexamine the *Baltimore & Ohio* case, and to adopt the reasoning of the four concurring Justices.

In our view—as the concurring Justices in the *Baltimore & Ohio* case argued—the majority opinion in that case failed properly to distinguish between the constitutional question whether the prescribed rates are so low as to deny the railroads just compensation, and the procedural question whether appellants “are barred from complaining in this suit, because they failed seasonably to raise, before the Commission, that issue and present there the evidence in support thereof.” 298 U. S. at 382. A constitutional right may be forfeited “by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.” *Yakus v. United States*, 321 U. S. 414, 444. This doctrine has repeatedly been applied to bar judicial consideration of a wide variety of constitutional objections not seasonably raised in the lower tribunal including, in *United States v. Capital Transit Co.*, 338 U. S. 286, the contention (not made before the Interstate Commerce Commission) that rates fixed by the Commission were confiscatory. If a litigant can be thus foreclosed from even *asserting* a constitutional right, *a fortiori* he can be barred from introducing additional evidence bearing on that right by failure to make a timely offer of such evidence.

The timeliness of the claim of confiscation and the request to submit additional evidence can be determined only in the light of all the facts in

the case, including compliance or non-compliance with the agency's rules of practice. Appellants could not go through an entire administrative proceeding, take their chance on a favorable decision, and then reopen the record "for the introduction of evidence long available and susceptible of production months before the Commission acted." *United States v. Northern Pacific Railway Co.*, 288 U. S. 490, 494.

II

If, as we contend, the Commission did not err in refusing to grant a rehearing, the district court properly refused to remand the case to the Commission to receive the additional evidence. *New York v. United States*, 331 U. S. 284, on which appellants rely, does not sustain their argument for remand. That case—in which the railroads' petition for rehearing did not seek to introduce additional evidence relating to confiscation—involved only the narrow question whether the district court properly received the evidence or whether, as the Government contended, the court should have remanded to the Commission to receive it. This Court did not have before it—and did not and could not decide—the issue whether the lower court should have remanded if the railroads had belatedly offered the evidence to the Commission and the latter had rejected it. It would be anomalous for this Court to hold that the Commission properly denied the petition for

rehearing, and then to allow the carriers to introduce the same evidence before the Commission on remand. Failure to make timely offer of the evidence to the Commission in the first instance should preclude its introduction at any subsequent stage of the proceedings.

The general rate increases granted by the Commission in *Ex Parte 175*, which are to be applied to the new rates, may reduce or eliminate the loss appellants allege. Moreover, there has been no showing that the increased costs which underlay *Ex Parte 175* are equally applicable to the Texas rates. Since, in the absence of actual operating experience under the *Ex Parte 175* increases, there is no way of knowing whether the new rates will fall below reasonable minimum levels, the present claim of confiscation appears "too speculative" for consideration at this time. *New York v. United States, supra.*

ARGUMENT

This appeal involves an order of the Interstate Commerce Commission which prescribed, as just and reasonable, new, lower rail freight rates on vegetables moving from Texas to points throughout the United States. Appellants, as the district court noted (R. 147), do not dispute that the record before the Commission supports its findings that the new rates are just and reasonable. They do not argue that the Commission erred in deciding the case in the first instance upon the record which appellants and complainant had made. Their sole contention is that the Commission im-

properly refused to reopen the record 21 months after it had been closed to permit appellants to present lengthy and detailed additional evidence relating to cost of service which could have been but was not offered at the hearing. The basis for this contention is that the new rates were allegedly confiscatory, and that appellants were not aware of this fact until the Commission fixed the new rates.

It is the Government's position that appellants were fully on notice during the course of the proceedings of the rates which were being sought, that they had ample opportunity to offer cost evidence prior to the Commission's decision, that they failed to make the showing required under the Commission's Rules of Practice to justify a reopening of the record, and that the Commission accordingly did not abuse its discretion in denying rehearing. In these circumstances, we believe that the district court correctly refused to remand the case to the Commission to receive additional evidence.

I

THE COMMISSION DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS' PETITION FOR REHEARING AND DECLINING TO REOPEN THE RECORD FOR ADDITIONAL COST EVIDENCE

A. APPELLANTS DID NOT MAKE THE SHOWING REQUIRED UNDER THE COMMISSION'S RULES OF PRACTICE TO JUSTIFY A REOPENING OF THE RECORD.

The Commission's Rules of Practice contain specific requirements relating to what must be

shown in a petition ~~for rehearing~~. Rule 101 (b) provides that when such petition seeks the opportunity to introduce additional evidence

the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and *explanation must be given why such evidence was not previously adduced.* [Italics supplied.]

We submit that appellants failed to present adequate explanation for their failure previously to adduce the cost evidence, and that the Commission did not abuse its discretion in declining to reopen the hearings to receive the evidence.

The petition for rehearing did not allege that the additional evidence was "in a legal sense, newly discovered," or that it related to "a change in economic or traffic conditions which required that the Commission's conclusion should be changed." Mr. Justice Brandeis, concurring in *Baltimore & Ohio Railroad Co. v. United States*, 298 U. S. 349, 387. It merely stated that the evidence which appellants desired to introduce "was not available to them at the time of the prior hearings" (R. 51), i. e., that the cost studies had not then been prepared.¹⁰ The additional evidence related to the revenues which would have been

¹⁰ The petition for rehearing stated that "much" of the cost evidence "has not yet been prepared for the particular roads and periods such evidence will cover" (R. 51). It further stated that if the petition were granted, petitioners would undertake promptly to prepare and present such evidence (*ibid.*).

earned under the new rates (R. 49-50), and the costs of providing the service, which were alleged to be "substantially in excess" of the new rates (R. 51). It was evidence which would have been admissible if offered at the hearing (see *infra*, p. 20). In fact, appellants themselves had introduced some cost evidence at the hearing in an attempt to justify the rate differentials between Texas and far west traffic. That evidence had related to the allegedly higher costs of transporting vegetables in refrigerator cars, the need to meet shipping schedules, and the heavy damage claims arising in recent years from this class of Texas traffic. The Commission considered this evidence, but found it inadequate to justify the Texas rates then in effect.

Appellants sought to justify their delay in offering the evidence on the ground that they "could not properly assume that the Commission would prescribe rates lower than the costs to defendants of rendering the service and, therefore, their omission to introduce cost-of-service evidence at the prior hearings does not foreclose them from offering such evidence of confiscation at a further hearing" (R. 51). The claim of "surprise," however, does not stand up under analysis.

While appellants did not know the precise rates which would be prescribed until the Commission handed down its decision, they were put on notice during the hearings in June, 1949, of

the rates which complainant was seeking.¹¹ The examiner filed a recommended decision in March, 1950, in which he proposed rates lower than those in effect but higher than those suggested by complainant. When new rates were prescribed by the Commission in its order of December, 1950—rates which, although lower than the examiner's, were nonetheless higher than those sought by complainant—appellants had known for 18 months what rates the Commission was being asked to fix as just and reasonable. Cf. *Washington ex rel. Oregon R. R. & N. Co. v. Fairchild*, 224 U. S. 510, 525-528. During that time they had ample opportunity to determine whether the proposed reductions would result in confiscatory rates.

Neither during the hearings, nor in the 18-month interval between their closing and the promulgation of the Commission's decision, did

¹¹ Appellants argue that the allegation in their complaint in the District court that they "did not, and could not foresee that confiscatory rates would be prescribed by the Commission in its orders" (R. 7) must be taken as true on the motion to dismiss (Br. 17). Insofar as the allegation related to the claim that the rates are confiscatory, it represents a legal conclusion obviously not admitted by the motion to dismiss. This is particularly true where, as here, the Commission found, contrary to the allegation, that the new rates were just and reasonable, *i. e.*, nonconfiscatory (see *infra*, p. 32). The fact that appellants did not know the precise rates which the Commission would prescribe is beside the point. The critical fact is that appellants were on notice of the rates sought by complainant, and could not delay offering additional cost evidence until the Commission decided the case.

appellants endeavor to present their cost evidence to the Commission. They did not seek a continuance of the hearings to prepare cost studies after complainant had proposed its rates. They did not seek a reopening of the record when the examiner made his recommendations. On the contrary, they remained mute on this issue for 21 months, and did nothing to indicate their desire to present additional evidence until 3 months after the Commission had rendered its decision.¹²

In short, appellants' attempt to reopen the record was no more than "a belated offering of evidence in support of a belated contention." Mr. Justice Brandeis, concurring in *Baltimore & Ohio Railroad Co. v. United States*, 298 U. S. 349, 388. The complaint before the Commission raised not only the issue that the rates were unduly prejudicial against Texas shippers, but also that they were unjust and unreasonable. Cost of service has always been regarded as a pertinent—although not the sole—criterion in determining whether rates are just and reasonable.¹³ Appel-

¹² Rule 101 (e) of the Commissioner's Rules of Practice provides that "Except for good cause shown," petitions for rehearing or reconsideration must be filed within 30 days after service of an order granting an application, and within 60 days after service of any other decision or order.

¹³ *Brownsville Navigation District v. St. Louis, B. & M. Ry. Co.*, 274 I. C. C. 5, 15-16; *All Rail Commodity Rates Between California, Oregon, and Washington*, 277 I. C. C. 511, 523-4, 528; see *Alabama Great Southern Railroad Co. v. United States*, 340 U. S. 216, 223. Appellants admitted in the lower court that cost evidence was "relevant" in rate proceedings before the Commission (R. 125).

lants themselves had offered some cost evidence at the hearing (see *supra*, pp. 4-5). If appellants had attempted to offer the additional evidence—or had sought a reasonable postponement of the hearing to permit its preparation—there is no reason to suppose that the Commission would have rejected the evidence or denied an appropriate continuation of the hearing.

We submit that the foregoing considerations fully justified the Commission in refusing to reopen the hearings for the introduction of the additional cost evidence. Appellants did not offer a satisfactory explanation, as required by the Commission's Rules of Practice, as to "why such evidence was not previously adduced." The Commission was accordingly acting well within its discretion in denying the petition for rehearing.

This Court has consistently held that the granting of a rehearing is a matter within the Commission's discretion. *Interstate Commerce Commission v. Jersey City*, 322 U. S. 503, 515-518, and cases there cited; *United States v. Pierce Auto Freight Lines*, 327 U. S. 515. In apparently only one case—*Atchison, T. & S. F. Ry. Co. v. United States*, 284 U. S. 248—has this Court treated the denial of a petition for rehearing as reversible abuse of discretion. The *Atchison* case involved a record which, as a result of the intervening depression between its closing in 1928 and the denial of the petition for rehearing in 1931, could not be

“regarded as representative of the conditions existing in 1931. That record pertains to a different economic era and furnishes no adequate criterion of present requirements.” (Pp. 260-261.) The *Atchison* case has been “restricted * * * to its special facts” (*Interstate Commerce Commission v. Jersey City*, 322 U. S. 503, 515) and obviously furnishes no precedent here where the petition for rehearing made no claim of any change in economic conditions. Cf. *United States v. Northern Pacific Railway Co.*, 288 U. S. 490.”

B. THE FACT THAT THE BELATED ALLEGATION IN THIS CASE WAS AN ALLEGATION THAT THE RATES WERE CONFISCATORY DID NOT REQUIRE THE COMMISSION TO DEPART FROM ITS RULES OF PRACTICE AND REOPEN THE HEARING TO RECEIVE ADDITIONAL COST EVIDENCE

As we have shown in Point A, *supra*, appellants' petition did not make an adequate showing under the Commission's Rules of Practice to justify the delay in offering the cost evidence. Thus, under well established principles, the denial of rehearing was within the Commission's discretion.

¹⁴ In *Northern Pacific*, a rate case, the record was closed in January, 1930. The Commission issued its final order in December, 1931, and in February, 1932, the railroads petitioned for rehearing on the basis of allegedly changed economic conditions. The Commission denied the petition. In holding that the Commission had not abused its discretion in so doing, this Court stated (p. 493):

“Between January 15, 1930 and February 3, 1932 no application based on changed economic conditions was made to the Commission, and that body was allowed to consider the record and prepare a report without notice of any claim in that behalf.”

Appellants argue, however, that they were entitled to rehearing despite the lack of such showing because their petition alleged that the rates were confiscatory. In support of this contention, they rely on the majority opinion in *Baltimore & Ohio Railroad Co. v. United States*, 298 U. S. 349. We believe, however, that the concurring opinion of Mr. Justice Brandeis (joined by Justices Stone, Roberts, and Cardozo) in that case—rejecting the majority view upon which appellants rely—states the rule which should apply here. We believe, as the four concurring Justices argued, that the majority opinion failed properly to differentiate between the existence of a constitutional right to a judicial determination of the issue of confiscation, and the time when such a right must be asserted if it is not to be waived. In our view, sound administrative and judicial practice dictates against applying the majority views in *Baltimore & Ohio* to the facts in this case. We ask the Court to reexamine *Baltimore & Ohio*, and to adopt the reasoning which led the four concurring Justices to the result in that case.

Baltimore & Ohio Railroad Co. v. United States involved a proceeding under Section 15 (6) of the Interstate Commerce Act for the division of joint rates between southern and northern railroads. A complaint was filed with the Commission by a group of southern carriers which alleged that the existing division of the

joint rates received by them was not "just, reasonable, and equitable" as required by Section 1 (4) of the Act (R. B. 40).¹⁵ The complaint requested the Commission to prescribe "just, reasonable, and equitable divisions" of such rates for the future, and to make such new divisions retroactive to the date on which the complaint was filed (*ibid.*; 298 U. S. at 355). Extensive hearings were held before an examiner (R. B. 309-1211), the examiner filed a proposed report, exceptions were filed, and the Commission heard oral argument (R. B. 39). In its report the Commission concluded that the existing divisions were unjust and unreasonable, and prescribed new divisions for the future (*ibid.*; 194 I. C. C. 729).

On the northern carriers' petition for reconsideration,¹⁶ the Commission substantially adhered to its previous decision (R. B. 79; 198 I. C. C. 375). The same carriers then filed a second petition for reconsideration. In this petition they alleged for the first time that, on the basis of a cost study attached to the petition, the prescribed divisions were confiscatory (R. B. 16,

¹⁵ References to the Record on appeal in the *Baltimore & Ohio* case, No. 312, October Term 1935, are cited as "R. B."

¹⁶ The petition requested the Commission to consider further the evidence already introduced, as well as certain supplemental data which it was stipulated might be considered as evidence (R. B. 80, 1549). The petition did not raise the issue, however, that the divisions were confiscatory.

95). The Commission denied this petition without opinion (R. B. 1629; 298 U. S. at 387).

The northern carriers then filed suit in the district court to set aside and enjoin enforcement of the Commission's order, 298 U. S. at 351. At the trial the railroads offered and the district court received, over the Government's objection (*id.* at 362), substantial evidence *de novo* with respect to the claim of confiscation (R. B. 1212-1548). After hearing this evidence, the district court held that the railroads had not established their claim of confiscation. *Baltimore & Ohio R. Co. v. United States*, 9 F. Supp. 181 (E. D. Va.).

On appeal, this Court unanimously affirmed (298 U. S. 349). A majority of five justices (Chief Justice Hughes, and Justices Van Devanter, McReynolds, Sutherland, and Butler) held that the railroads had seasonably raised the claim of confiscation before the Commission, that the district court had properly considered this contention, and that in passing on it the district court had not erred in receiving additional evidence. The majority further held, however, that the railroads' evidence was not sufficient to sustain their contention that the divisions were confiscatory.

Four Justices (Justices Brandeis, Stone, Roberts and Cardozo), concurring, were of the view that the railroads had failed to raise seasonably the confiscation issue before the Commission, and that such failure should have barred the district court from considering the conten-

tion. They accordingly did not reach the merits of the confiscation issue.

The reasoning of the majority opinion (per Butler, *J.*), on the question of confiscation was as follows: Neither Congress nor its agency (the Commission) can finally determine what constitutes just compensation for the taking of property (p. 368). When an owner of property "appropriately invokes the just compensation clause, he is entitled to a judicial determination of the amount. The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved" (pp. 368-369). Raising the confiscation issue on the second petition for rehearing was timely. Since the complaint to the Commission raised no question concerning confiscation "in the constitutional sense" (p. 363), the railroads "could not foresee that confiscatory restitution would be required or that confiscatory divisions would be prescribed; they were not bound, in advance of the Commission's findings and report, to set up a fear of transgression of their constitutional rights" (p. 370). "The railroads could not have raised the confiscation issue on the report of the examiners, since that was merely a recommendation by an employee of the Commission (pp. 370-371). No Act of Congress requires carriers, in advance of a suit to set aside Commission orders, to petition the Commission for rehearing (p. 371). The railroads "were not

given and could not obtain a hearing before the commission upon the question of confiscation. Their earlier failure to invoke constitutional protection does not bar this suit" (*ibid.*).

Mr. Justice Brandeis, writing the concurring opinion, was of the view that the railroads were barred from raising the confiscation issue before the district court "because they failed seasonably to raise, before the Commission, that issue and present there the evidence in support thereof" (p. 382). Pointing out that the reasonableness of the underlying rate order was not challenged, he noted that the non-compensatory character of the divisions would be only one of many facts that the Commission was required to take into consideration in determining a fair division (pp. 383-384). Since the second petition for rehearing alleged "no controlling change of condition" and no claim of newly discovered evidence as a reason for reopening the record, the Commission did not abuse its discretion in failing to receive additional evidence or to pass upon the issue of confiscation. Hence the order prescribing new divisions was free of "inherent error" (pp. 388-389).

We think that Mr. Justice Brandeis' view of the *Baltimore & Ohio* case as presenting a procedural rather than a constitutional problem is correct. The constitutional issue of whether the prescribed rates are so low as to deny the railroads just compensation is separate and distinct

from the procedural question whether "they are barred from complaining in this suit, because they failed seasonably to raise, before the Commission, that issue, and present there the evidence in support thereof" (p. 382). The majority opinion itself recognized that a litigant may lose the right to a judicial determination of the confiscation issue by failure to raise it seasonably, observing that this right is available where the litigant "appropriately invokes the just compensation clause" (p. 368). * [Italics supplied.]

The position for which appellants invoke the majority opinion in the *Baltimore & Ohio* case—that because confiscation is a constitutional issue, the Commission or a court is required to receive new evidence on this issue even though the party could have, but failed to, introduce such evidence before the conclusion of the administrative proceedings—has been sharply impaired, if not abandoned, by subsequent decisions of this Court. It is settled today that the limitation of judicial review "to the record taken before the Commission presents no constitutional infirmity." *Alabama Commission v. Southern Ry. Co.*, 341 U. S. 341, 348. It is settled, too, "that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved." *Ibid.* No reason appears today to support the argument against applying in rate-making cases, as in others, the rule that "a constitutional right may be forfeited * * * by the failure to make

timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U. S. 414, 444. This doctrine has repeatedly been applied in a variety of situations by this Court and other federal courts to bar judicial consideration of constitutional objections not seasonably raised in the lower tribunal.¹⁷ In

¹⁷ *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U. S. 103, 113 (privilege against self-incrimination); *United States v. Gale*, 109 U. S. 65 (constitutionality of statute disqualifying jurors); cf. *Bradley v. Richmond*, 227 U. S. 477 (failure to participate in hearings on classification of occupations precluded challenge under 14th amendment to plaintiff's classification as a "private banker" under local license tax ordinance).

In several recent statutes Congress has specifically provided, in accordance with well settled judicial practice, that only objections made before the agency can be considered by the reviewing court. See *United States v. Tucker Truck Lines*, No. 18, this Term, slip opinion p. 3. In a number of cases under such statutory provisions the courts have refused to consider constitutional objections not made before the agency. *Todd v. Securities and Exchange Commission*, 137 F. 2d 475, 478 (C. A. 6); *Halsted v. Securities and Exchange Commission*, 182 F. 2d 660 (C. A. D. C.) (contention that agency had no jurisdiction over company because latter not engaged in interstate commerce); *New England Air Express v. Civil Aeronautics Board*, 194 F. 2d 894 (C. A. D. C.) (objection to failure to conduct evidentiary hearings); *Western Air Lines v. Civil Aeronautics Board*, 196 F. 2d 933 (C. A. 9), certiorari denied Nov. 10, 1952, No. 337, this Term (claim that suspension of airline's certificate of public convenience and necessity constituted taking of property without just compensation). In the *Todd* case the court refused to consider a challenge to the constitutionality of the Public Utility Holding Company Act of 1935, 49 Stat. 838, 15 U. S. C. 79, not made before the agency, even though the latter was not empowered to pass upon the question.

United States v. Capital Transit Co., 338 U. S. 286, it was invoked to preclude consideration of the claim—not made before the agency and first raised in the district court¹⁸—that a rate fixed by the Interstate Commerce Commission was confiscatory. The Court stated (p. 291):

the record fails to show that this issue was properly presented to the Commission for its determination. Therefore the question of confiscation is not ripe for judicial review.

Seeking to distinguish the *Capital Transit* decision, appellants argue (Br. 16) that there “the issue of confiscation had not been properly raised before the Commission.” But that, of course, is precisely the point here. The result in *Capital Transit* is rendered trivial, we think, if the rule of orderly procedure there announced means only that the issue is “properly raised before the Commission” when it is finally tendered 21 months after the Commission’s hearing closes, after the ample time to seek rehearing under the Commission’s rule has expired, and without showing previous unavailability of the allegation or the evidence.

While many of the cases dealing with waiver of constitutional rights through failure to make timely assertion relate to situations where the issue was not raised at all in the lower tribunal,

¹⁸ Record on appeal, No. 40, October Term 1949, pp. 7-8, 115.

the rationale of the cases is equally applicable where the contention, although made in the court of first instance, came too late in the proceedings there.” *United States v. Nudelman*, 104 F. 2d 549 (C. A. 7), certiorari denied, 308 U. S. 589. In either situation, the litigant loses his right to press the constitutional objection if he fails to raise it at the earliest reasonable opportunity to do so. If a litigant can be thus foreclosed from even *asserting* a constitutional right, *a fortiori* he can be foreclosed from introducing additional evidence bearing on that right by failure to make a timely offer of such evidence. Cf. *Colorado Radio Corporation v. Federal Communications Commission*, 118 F. 2d 24 (C. A. D. C.).

The distinction between the right to attack a rate as confiscatory and the right to introduce additional evidence in support of that contention is important. In the instant case, for example, appellants could urge before the district court that the rates were confiscatory. But in pressing this contention they were restricted to the record before the Commission. Appellants’ right to a

¹⁰ Cf. *United States v. Tucker Truck Lines*, No. 18, this Term, holding that an objection to the qualification of the hearing examiner under the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, came too late when made during judicial review. This Court stated that although the irregularity would have invalidated the Commission’s order if the Commission had overruled an appropriate objection “made during the hearings,” it did not void the order “in the absence of *timely objection*.” Slip opinion, p. 5; italics supplied.

judicial determination of the issue of confiscation, cf. *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 51-52, does not carry with it any concomitant right belatedly to introduce additional evidence in support of that contention.

Appellant's contention that the rates are confiscatory is but another way of arguing that they are not just and reasonable. For "the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense." *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U. S. 575, 585. In finding that the new rates were just and reasonable, the Commission perforce found that, *on the record before it*, they were not confiscatory. Cf. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 607. The way is always open to appellants to challenge the new rates "if, after a fair test, they prove to be below the lowest reaches of a reasonable minimum." *New York v. United States*, 331 U. S. 284, 340; Mr. Justice Brandeis, concurring in *Baltimore & Ohio Railroad Co. v. United States*, 298 U. S. 349, 383, 391. In such a case, appellants can institute new proceedings before the Commission seeking the prescription of just and reasonable, i. e., non-confiscatory, rates. *Ibid.*

The alleged constitutional issue in this case thus reduces itself to the procedural problem of whether applicants lost their right to introduce additional evidence relating to confiscation when they failed to raise the issue during the 18

months they had adequate opportunity to do so. Perhaps the filing of a complaint seeking Commission prescription of just and reasonable rates may not have put appellants on sufficient notice that possibly confiscatory rates were being sought to require them to make the contention.²⁰ Once specific rates were proposed, however, it was incumbent upon appellants to present all available arguments or evidence to show that the proposed rates were unjust or unreasonable—including, of course, evidence that such rates would be confiscatory. Appellants had ample opportunity to argue and tender evidence on the issue of confiscation in their exceptions to the examiner's report,²¹ in their briefs, or in oral argument. More-

²⁰ It should be noted, however, that the complaint in this case was based in part on the specific allegation that the Texas rates were higher than corresponding rates on the same traffic from the far-western states. Since the Commission's power to prescribe just and reasonable rates under Section 15 (1) "includes the power to prescribe rates which will substitute lawful for discriminatory rate structures," *New York v. United States*, 331 U. S. 284, 346, cf. *Youngstown Sheet & Tube Co. v. United States*, 295 U. S. 476, appellants were on notice even then that complainant was asking the Commission to prescribe just and reasonable rates which would eliminate the discrimination by bringing the Texas rates into line with those from the far west area.

²¹ Respectfully questioning the view of the majority in the *Baltimore & Ohio* case (298 U. S. at 370-371) that the railroads could not have raised the issue on the examiner's report, we submit that the question whether the examiner's report was merely advisory is irrelevant. The critical issue is whether it constituted sufficient notice to appellants to require them to come forward with their evidence. When the

over, the way was always open for them—at any time prior to decision—to file a petition requesting that the record be reopened to receive the additional evidence. Rule 102, General Rules of Practice Before the Interstate Commerce Commission.

Appellants could not go through a protracted administrative proceeding, contest the case on the merits, let the Commission decide the case on the record they had helped to make, and then, three months after the final decision had gone against them, seek to reopen the entire case to offer evidence which they could and should have previously presented. “[T]he public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact,” *United States v. Atkinson*, 297 U. S. 157, 159, dictates against such practice.

The statement by this Court in *United States v. Northern Pacific Railway Co.*, 288 U. S. 490, 494, is particularly applicable to the case at bar:

examiner's report in the instant case was filed on March 9, 1950, more than eight months had elapsed since the railroads had been put on notice at the hearings of the rates proposed by complainant. During this interval, they had ample opportunity to study the proposals and to evaluate them in the light of their operating costs.

Moreover, whatever may have been the significance of the examiner's report at the time of the *Baltimore & Ohio* case, it carries considerably greater weight today. Cf. *Universal Camera Corp. v. National Labor Relations Board*, 340 U. S. 474.

* * * the carriers' lack of diligence in bringing this matter to the Commission's attention deprived them of any equity to complain of the refusal of their petition. They sat silent and took the chance of a favorable decision on the record as made. They should not be permitted to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order.

The same considerations apparently underlay the district court's dismissal of the complaint. As Judge Harper stated during the hearing (R. 131):

if you can proceed as you gentlemen are proceeding in this case, there can never be any end about rate matters. In other words, you hear them, if you are not satisfied, you claim they are confiscatory and delay the matter two or three years, frankly * * * it just doesn't make sense.

Appellants argue that the Commission's decision in this case would require the railroads to prepare complex cost studies in every rate reduction proceeding "if they are to be fully protected from an invasion of their constitutional rights." (Br. 19.) Such alarm, however, is groundless. In the first place, as appellants themselves admit (*ibid.*), such studies would "ob-

viously not be necessary in most cases," since the issue of confiscation is likely to arise only in a small number of rate proceedings. Appellants themselves cite data showing that cost evidence "is not usually necessary" in rate cases before the Commission (Br. 17-18; cf. R. 125). Secondly—and more important—we do not contend that the carriers must offer cost evidence in response to a complaint which merely alleges that current rates are "unreasonable" and seeks the prescription of lower "reasonable" rates. The railroads' obligation to offer the evidence only arises when they are on notice of the precise rates sought. Since cost data are within the carriers' control, they are in the best position to determine whether the rates suggested appear sufficiently close to the confiscatory line to justify the preparation of cost studies.

The question whether the claim of confiscation and the request to submit additional evidence was timely can be determined only in the light of all the facts in the case, including compliance or non-compliance with the agency's rules of practice. Here appellants had ample opportunity to offer such evidence during the 18 months that the proceeding was pending before the Commission, but failed to avail themselves of it.²² Under such cir-

²² It is significant in this connection that appellants did submit some cost evidence at the hearings. See *supra*, pp. 4-5. The additional cost evidence relating to the claim of confiscation, while perhaps not merely cumulative, was nevertheless supplementary to that previously offered.

cumstances, we submit that principles of sound administrative procedure compel the conclusion—in accordance with the views of Justices Brandeis, Stone, Roberts and Cardozo—that the attempt to introduce additional cost evidence under the claim of confiscation came too late.

II

THE DISTRICT COURT CORRECTLY REFUSED TO REMAND THE CASE TO THE COMMISSION TO TAKE ADDITIONAL EVIDENCE.

Although appellants originally proposed to introduce the additional evidence before the district court (R. 80-81), they shifted their position during the proceedings below and urged the district court to stay the cause and remand to the Commission to receive the additional evidence (R. 96, 126, 135-136).²³ We do not disagree with appellants' contention that, if further cost evidence is to be received, it should be taken by the Commission rather than the district court. However, if we are correct in our view that the Commission did not err in refusing to grant rehearing to receive the evidence, we submit that the district court properly refused to remand the case.²⁴

²³ At the hearing in the district court the Government stated that if its motion to dismiss were denied, the matter should be remanded to the Commission (R. 117).

²⁴ There is some question as to whether appellants' complaint in the district court adequately sets forth a claim that the prescribed rates are confiscatory. This Court has pointed out that in order to invoke the constitutional protection

Appellants rely on *New York v. United States*, 331 U. S. 284, 334-336, to support their contention that remand was required (Br. 21-22). In the *New York* case, a rate proceeding, the railroads raised the confiscation point for the first time in a petition for rehearing by the Commission. "But in doing so they rested on the record, before the Commission and tendered no additional evidence" (p. 334).²⁵ The Commission denied the petition. In the district court the railroads introduced, over objection, further evidence relating to confiscation (*ibid.*). In its brief before this Court

against confiscatory rates, "the facts relied on to restrain the enforcement of [such] rates * * * must be specifically set forth, and from them it must clearly appear that the rates would necessarily deny to the plaintiff just compensation and deprive it of its property without due process of law." *Aetna Insurance Co. v. Hyde*, 275 U. S. 440, 447; see *Louisville & Nash. R. R. Co. v. Garrett*, 231 U. S. 298, 314-315; *Beaumont, S. L. & W. Ry. Co. v. United States*, 282 U. S. 74, 88-89. The general allegation in appellants' complaint that the prescribed rates "will yield to the carriers affected by the order, including plaintiffs herein, and to each of them, revenue less than the costs of providing the service covered by said rates" (R. 79), hardly seems to meet this exacting requirement. Moreover, it is by no means clear that confiscation is shown by the fact that the cost of rendering a particular service exceeds the revenues therefrom, in the absence of a showing that the overall operations of the carrier do not produce a fair rate of return. Cf. *New York v. United States*, 331 U. S. 284, 338; Mr. Justice Frankfurter, concurring in *Alabama Commission v. Southern Railway Co.*, 341 U. S. 341, 352.

²⁵In fact, the railroads stated that the record as made "was as complete as it was possible to present." Record on Appeal, Nos. 343, 344, 345, October Term, 1946, p. 12681.

the Government argued that the district court should not have received the evidence, but should, if the evidence could be presented at all, have remanded the matter to the Commission.²⁶ The Government did not contend, however, that the railroads would have been foreclosed from introducing additional evidence before the Commission if the district court had remanded.

Thus the narrow question before the Court in the *New York* case was whether the district court properly received the evidence, or whether it should have remanded the case to the Commission. The Court did not have before it—and could not and did not decide—the issue whether the lower court should have remanded if the railroads had belatedly offered the evidence to the Commission in the first instance, and the Commission had rejected it. Holding that remand was, in any event, unnecessary, the Court accepted the Government's view that, in the circumstances there presented, "if the additional evidence was necessary to pass on the issue of confiscation, the cause should have been remanded to the Commission for a further

²⁶ The Government contended that the district court erred in receiving the evidence because (1) the railroads had stated in their petition for rehearing filed with the Commission that they did not wish to introduce additional evidence, and (2) the doctrine of exhaustion of administrative remedies required that such evidence be presented initially to the agency. Brief for the United States and the Interstate Commerce Commission, Nos. 343, 344, 345, October Term, 1946, pp. 249-253.

preliminary appraisal of the facts which bear on that question" (p. 336).²⁷

In the significantly different circumstances of this case, however, if the Commission did not err in rejecting appellants' belated offer of additional evidence, we submit that remand to the Commission is unwarranted. It would be anomalous for this Court to hold that the Commission properly denied the petition for rehearing, and then to allow the railroads to introduce the same evidence before the Commission on a remand by the district court. Since "correct practice requires that * * * all pertinent evidence bearing on the issues tendered the Commission should be submitted to it in the first instance * * *," *New York v. United States, supra*, p. 335, failure to make timely offer of such evidence to the Commission in the first instance should preclude its introduction at any subsequent stage of the proceedings.²⁸

There appears to be a further infirmity in appellants' challenge to the rates as confiscatory. After appellants had filed their petition to set aside the Commission's order, the Commission on

²⁷ It reached that conclusion on the theory that the prescribed rates were interim ones and the Commission "has not finished with this problem" (p. 338). Cf. pp. 40-42, *infra*.

²⁸ Since appellants do not contend that the district court itself should have heard the additional cost evidence, we do not discuss the issue. We do note, however, that the same considerations against remand that we have set out in the text also dictate against a hearing *de novo* in the district court on the issue of confiscation.

April 11, 1952, granted a further general increase in freight rates in *Ex Parte 175*, 284 I. C. C. 589. This increase is applicable to the rates involved in this proceeding (R. 64). Appellants argued in the District Court that the *Ex Parte 175* increases were granted "to take care of rising costs" (R. 128). However, since the Commission had not decided *Ex Parte 175* when the first petition for rehearing was filed, the cost problem on which that petition was based may have been solved by the general increase granted in *Ex Parte 175*. Thus it may well be that "any loss which would have been suffered" through the rate reductions involved in the instant case "has probably been at least lessened, if not eliminated, by the general rate increase." *New York v. United States, supra*, p. 339. Moreover, there has been no showing that the increased cost factors which underlay *Ex Parte 175* are equally applicable to the Texas vegetable rates. In the absence of actual operating experience under the *Ex Parte 175* increases, there is no way of knowing whether the new rates will fall below the minimum reasonable level. The present claim of confiscation would thus appear "too speculative" for consideration at this time. *New York v. United States, supra*, p. 339.

The intervening increase in the rates appellants attack serves to heighten the impropriety of their belated effort to present evidence on their alle-

gation of confiscation. The appellants "could of course apply to the Commission to modify the order so as to make it just for the future", "for every rate order is subject to revision at any time upon application to the Commission". *B. & O. R. Co. v. United States, supra*, at 382, 384 (concurring opinion). Upon such application, the results of operation under the rates which are in effect could be adduced, and any necessary change in rates would reflect the changed circumstances which are relevant at this late day. On the other hand, acceptance of appellants' contention that the hearings must be reopened to receive evidence which they failed seasonably to produce would make the task of rate determination in cases of this type an unduly extended and uncertain process.²⁹

²⁹ In *United States v. Tucker Truck Lines*, No. 18, this Term, this Court pointed out that "simple fairness" to those engaged in administration and to litigants requires that objections in administrative proceedings be "made at the time appropriate under * * * [the agency's] practice." Slip opinion, p. 4. The fixing of just and reasonable rates under the Interstate Commerce Act involves a balancing of the interests of shippers and carriers. Cf. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 603. Approximately 2½ years elapsed between the filing of the complaint and the prescription of just and reasonable rates by the Commission. During that interval complainant's members continued to ship under rates found by the Commission to be unjust and unreasonable. Their right to relief from such rates should not be further delayed by the railroads' belated attempt to introduce additional evidence.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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DECEMBER 1952.

APPENDIX A

The Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1, *et seq.*, provides in part as follows:

SEC. 1 (4). It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

SEC. 1 (5) (a). All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any

part thereof is prohibited and declared to be unlawful.

SEC. 3. (1). It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

SEC. 15 (1). That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part, for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions

of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SEC. 17 (6). After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5), any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter deter-

mined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon by the Commission. If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for consideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, order, or requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this paragraph, any application for rehearing, reargument, or reconsideration of the matter assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2), if such application shall have been filed within twenty days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5), and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing.

APPENDIX B

Excerpts from the proposed report of Examiner A. J. Banks in Docket No. 30074; *Texas Citrus and Vegetable Growers and Shipper v. Atchison, Topeka & Santa Fe Railway Company, et al.* [filed March 9, 1950].

* * * * *

Rates sought.—In lieu of the numerous alternate combination and joint through rates which apply on the various individual commodities to the numerous destinations herein, complaint seeks three distance scales applicable on all vegetables which would alternate and which would be subject to minima of 20,000 pounds, 24,000 pounds, and 28,000 pounds. These scales are based on the appendix 10 scale in *Class Rate Investigation, 1939, supra*. These rates are proposed to apply on all vegetables in straight or mixed carloads, to all destinations, except points in the Southwest to which low motor competitive rates were established on December 2, 1940, and except that a 15 percent differential is proposed for the distance in the so-called mountain-Pacific territory, west of the eastern boundary of Montana, Wyoming, and New Mexico and west of the eastern one-third of Colorado.

The hauls in so-called differential territory on traffic to Groups A to E are 1,351 miles from Salinas, 822 miles from Phoenix and 331 miles from Grants; those to Groups K to M are 1,168 miles from Salinas, 432 miles from Phoenix, and 331 miles from Grants. Complainant suggests that the proposed

scales apply from individual origins in Texas, except from points in Texas Groups 1, 3 and 4, which groups should have the same rates based on average distances. Representative short-line distances stated in miles from points in Texas to Pittsburgh, are as follows: Harlingen 1,663, Crystal City 1,590, Laredo, 1,622, Corpus Christi 1,551, Eagle Pass 1,633, Farmersville 1,187, Hereford 1,427, Greenville 1,172 and Jacksonville, Tex., 1,183 miles. Jacksonville is a representative point in Group 5; Greenville and Farmersville are representative points in Group 6; and Hereford is a representative point in Group 7. Representative proposed rates appear in the following table.

Distance	Min. 28,000 lbs.		Min. 24,000 lbs.		Min. 20,000 lbs.	
	Rates	Differ.	Rates	Differ.	Rates	Differ.
	Cents	Cents	Cents	Cents	Cents	Cents
50 miles	28	4	30	5	34	5
100 miles	31	5	35	5	38	6
200 miles	42	6	44	7	49	7
300 miles	52	8	55	8	61	9
500 miles	65	10	70	11	77	12
700 miles	79	12	84	13	94	14
900 miles	92	14	100	15	110	17
1,200 miles	112	17	119	18	129	19
1,500 miles	126	19	133	20	144	22
1,800 miles	138	21	146	22	158	24
2,200 miles	151	23	160	24	174	26
2,700 miles	163	25	173	26	199	28
3,200 miles	175	26	186	28	203	30

¹ Burlington Shippers' Association proposes 81 cents, minimum 18,000 pounds, and 68 cents minimum 24,000 pounds.

² Burlington shippers propose \$1.08, minimum 18,000 pounds, and 90 cents, minimum 24,000 pounds.

³ Burlington shippers propose \$1.35, minimum 18,000 pounds, and \$1.13, minimum 24,000 pounds.

⁴ Burlington shippers propose \$1.61, minimum 18,000 pounds, and \$1.36, minimum 24,000 pounds. The Burlington shippers propose column 26, minimum 24,000 pounds, on potatoes and column 28.5, minimum 24,000 pounds, on cabbage, to alternate with their proposed scales on all vegetables, referred to in connection with the preceding table. [Mimeographed pp. 4-5.]

It has been apparent for some time that the system of numerous column rates with meticulously graded minima, and in some instances different column rates in connection with the same minimum, has become outmoded on vegetable traffic not only from

Arizona, California, and New Mexico but also on vegetables from the Southwest as well. This record, however, is not sufficiently comprehensive to afford a basis for the prescription of three alternate distance scales of rates based on minima of 20,000 pounds, 24,000 pounds, and 28,000 pounds, as proposed by complainant. For example, there appears to be no good reason for reducing the assailed ratings of column 33.5 or less in connection with minima of 24,000 pounds or higher. However, the ratings of column 43, minimum 20,000 pounds, on vegetables such as green peas, string beans, lima beans, green beans, and cauliflower, column 40.5, minimum 20,000 pounds, on vegetables such as peppers and tomatoes, and column 38 on certain vegetables, are obsolete by reason of the fact that lower combination rates actually apply on those commodities. The minimum of 16,000 pounds on lettuce is obviously obsolete in the light of *Estimated Weights on Lettuce from Southwest* (I & S No. 5633), decided December 29, 1949, and in the light of the 20,000-pound minimum on that commodity from Arizona and California. Likewise, the minima of 17,500 pounds on parsley, spinach, and similar leafy vegetables is out of line with minima no lower than 20,000 pounds on practically all vegetables from Arizona and California. Column 36 rates, minimum 20,000 pounds, from Texas to official territory east of Illinois, on vegetables such as cauliflower, lettuce, parsley, peas, beans, peppers, spinach, and tomatoes, would compare favorably with the combination rates now actually applied on those vegetables, particularly when the increase in minimum weight is taken into consideration. Uniform rates on all vege-

tables, minimum 20,000 pounds, would alleviate somewhat the present complicated rate structure, particularly on mixed car-load shipments.

The Commission should find that the assailed rates are not shown to be unduly prejudicial or unreasonable, except that, on shipments from Texas points to official territory generally east of Illinois territory, the assailed rates on all vegetables, fresh or green (other than cold pack), as described under the heading "Vegetables, fresh or green" in western classification are, and for the future will be, unreasonable to the extent that they exceed or may exceed column 36 rates, minimum 20,000 pounds; provided that those rates shall alternate with lower column rates where not [now] applicable; and provided further, that the above-prescribed column 36 rates shall be based on the first class rates now used as a basis for the present column rates.

An appropriate order should be entered.
[Mimeographed pp. 21-22.]

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In the
Supreme Court of the United States
OCTOBER TERM, 1952

No. 258

**THE BALTIMORE AND OHIO RAILROAD COMPANY, BOSTON
AND MAINE RAILROAD, ERIE RAILROAD COMPANY, et al.,**

Appellants,

**UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION AND TEXAS CITRUS AND VEGETABLE
GROWERS AND SHIPPERS, .**

Appellees.

*Appeal from the United States District Court for the
Eastern District of Missouri*

**BRIEF FOR TEXAS CITRUS AND VEGETABLE
GROWERS AND SHIPPERS, APPELLEE**

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Date: December 8, 1952.

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Appellees.

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**BRIEF FOR TEXAS CITRUS AND VEGETABLE
GROWERS AND SHIPPERS, APPELLEE**

1. QUESTIONS PRESENTED

This Court is not yet confronted with the three questions raised by Appellants on page 2 of their brief. The sole question before the Court at this time is whether the trial court abused its discretion in granting motions to dismiss the complaint on the ground that it did not state a cause of action.

2. STATEMENT OF THE CASE

Appellants' statement of the case on pages 3 to 5, incl., of their brief omits the following important facts:

(a) The petition filed with the Interstate Commerce Commission on March 16, 1951 (R. 48-58), for further hearing to submit additional evidence did not comply with Rule 101 of the Commission's Rules of Practice in that it did not show that the evidence to be submitted was relevant or give any satisfactory explanation as to why it was not offered at the two previous hearings.

(b) The rates prescribed by the Commission were and are approximately 200 per cent of the rates on the same vegetables which have been voluntarily maintained and applied from the same origins to southwestern destinations for more than twelve years (R. 16 and 86).

(c) The rates prescribed by the Commission yield from 16.7 mills to 23.8 mills per ton miles whereas the present rates on the same vegetables from California to the same destinations yield from 10.0 mills to 18.8 mills per ton mile, and the California rates have been voluntarily maintained and applied by Appellants for many years (R. 44-A, 45 and 87-89).

(d) To many destinations in the territory covered by the order of the Commission the prescribed rates resulted in no reduction in revenue because combinations of local rates in effect at the time the order was issued result in lower through charges than can be obtained under the prescribed scale of rates (R. 44-A and 87).

(e) The complaint contained conflicting allegations. On the one hand it alleged that the prescribed rates would yield revenue less than the cost of providing service (R. 79). On the other hand it alleged that the prescribed rates were and are substantially higher than rates which Appellants have voluntarily maintained and applied on like traffic for many years (R. 16, 44-A, 86, 87-89).

(f) Motions referred to on page 5 of Appellants' brief were not filed contemporaneously. Motion to dismiss by this Appellee was filed five days prior to Appellants' motions to stay and remand. Motions to dismiss were based on the ground that "the complaint fails to state a cause of action." (R. 83.) The trial court did say that Appellants should have submitted all of their evidence to the Commission at one of the two hearings previously held in this case, but the motions to dismiss were granted because the trial court apparently agreed that the complaint fails to state a cause of action.

3. SUMMARY OF ARGUMENT

The primary question at issue is whether the trial court abused its discretion in granting motions to dismiss. For the purpose of those motions, all facts stated in the exhibits attached to and made a part of the complaint must be taken as true. In case of conflict between the exhibits and conclusions stated in the complaint, the facts in the exhibit must control.

Appellants do not contend that the order of the Commission was not supported by substantial evidence or that the

order was issued without adequate hearings. The Commission held two separate hearings, a proposed report was issued, exceptions were filed by all parties and the case was orally argued. But Appellants contend that the Commission acted arbitrarily and capriciously in refusing to grant a third hearing, based on a petition which did not comply with the Commission's Rules of Practice. This, they contend, results in taking their property without due process of law.

The complaint shows that the Commission had under consideration a relationship case involving rates on vegetables from Texas to all destinations in the United States. It considered the general level of rates on vegetables from Arizona, California and New Mexico to the same destinations and the general level of rates within the Southwest, all of which have been voluntarily maintained and applied by Appellants for many years. It found that the rates under attack on certain vegetables to certain destinations were substantially in excess of the Southwestern level and the level voluntarily maintained from Arizona, California and New Mexico origins to the same destinations and were unreasonable. It prescribed reductions in the rates on certain vegetables from Texas to a portion of the destinations involved but the prescribed rates are still higher on the average than other rates which have been voluntarily maintained and applied by Appellants for many years.

Based on all of the facts shown in the complaint, the trial court correctly held that the complaint did not state a cause of action, that it did not show that the Commission had

acted arbitrarily or abused its discretion and that the facts alleged do not show that the prescribed rates are confiscatory. The trial court's decision will not affect past or future practices as to submission of evidence dealing with the reasonableness of rates in either relationship cases or revenue cases.

The trial court acted within its discretionary power in granting motions to dismiss. Motion to affirm should be granted. The order of the trial court should be affirmed.

4. ARGUMENT

A. The Complaint, Considered in Its Entirety, Will Not Justify Setting Aside the Commission's Order

The primary question at issue in this case is whether the trial court abused its discretion in granting motions to dismiss the complaint, as amended, because it did not state a cause of action. In their brief Appellants stress two main points as follows:

First, for the purposes of a motion to dismiss, facts alleged in the complaint must be taken as true. (Page 6.)

Second, determination of the issue of confiscation is a judicial question which must be determined by a court. (Page 10.)

Under the first point they contend that the trial court should have looked at only a part of the complaint. In Paragraph IX of the complaint (R. 78), it is alleged that *the refusal of the Commission to grant a rehearing was:*

(a) arbitrary and capricious

(b) an abuse of its discretion

(c) deprivation of property without due process of law.

In Paragraph X (R. 79), it is alleged that the Commission's order would deprive plaintiffs of their property without due process of law.

But Exhibits 1 and 4 (R. 9-47 and R. 60-68) were attached to the complaint and made a part thereof (R. 75). The facts found by the Commission and stated therein were not questioned. They show conclusively that Appellants have for years voluntarily maintained and applied rates substantially less than the rates prescribed in this case. Those facts must also be taken as true for the purposes of the motions to dismiss. They must be considered along with the other allegations. In case of conflict, the exhibits control.

This is a suit to test the validity of a rate order issued by the Interstate Commerce Commission. Such orders, operating, in futuro, cannot be annulled and set aside by the courts unless:

- (a) They are unsupported by evidence
- (b) They are made without a hearing
- (c) They exceed constitutional limits
- (d) They are arbitrary and amount to an abuse of power.

Board of Trade of Kansas City v. United States, 314 U. S. 524, 546.

Neither the complaint nor the petitions to the Commission alleged that the decision and order are unsupported by substantial evidence.

The complaint does not allege that the Commission failed to grant plaintiffs a full and complete hearing. Two hearings were held in June, 1949, one at Harlingen, Texas, and one at Los Angeles, Calif. The hearings lasted four days and Appellants were given full opportunity to introduce any relevant testimony they had to offer. A proposed report was served by the Commission's Examiner, exceptions were filed and the case was orally argued before the entire Commission at Washington. The first decision was handed down December 21, 1950 (R. 9), eighteen months after the hearings closed. The case was reopened for further consideration and a supplemental decision and order were issued January 7, 1952 (R. 60).

The allegations of the complaint as to whether the order exceeds constitutional limits will be discussed in Section C of this argument.

B. No Abuse of Discretion Shown in Complaint

Paragraph IX of the complaint (R. 78) states that the refusal to grant a rehearing was "arbitrary and capricious and an abuse of its discretion." That is merely a conclusion and no facts are alleged showing that the Commission was arbitrary, capricious or abused its discretion. Exhibits 3 and 4 (R. 59-68) show that a further hearing on the existing record was granted but plaintiffs were not permitted

to present additional evidence. Below we give a brief chronological history of the case before the Commission.

Complaint was filed with the Commission August 24, 1948. Hearings were held in Harlingen, Texas, June 15, 1949, and in Los Angeles, Calif., June 23, 1949. The two hearings lasted four days and the abstract of facts comprises 613 pages of oral testimony and 115 rate and statistical exhibits many of which comprise as many as 50 pages 13 inches by 17 inches in size. Appellants introduced considerable testimony regarding the cost of handling vegetables (R. 30-31) and they were permitted to submit all relevant testimony offered. The presiding examiner rendered a proposed report, all parties were permitted to file exceptions thereto and the case was orally argued before the entire Commission at Washington. The decision of the Commission was handed down December 21, 1950. Then, and not until then, did plaintiffs offer to submit the testimony as to costs referred to in Exhibit 2 (R. 48-50). That petition was not filed until March 16, 1951.

In reply to a motion to dismiss on the ground that the complaint did not state a cause of action, Appellants stated:

"The gravamen of plaintiffs' cause is that plaintiffs have not had a hearing at which time they can assert their constitutional rights." (R. 119.)

The failure to grant the third hearing for receipt of evidence which was not previously offered seems to be the real basis for this suit. We are aware that Mr. Gray stated (R. 124) that is only part of the allegations in the complaint, but the language of the complaint indicates that

the foregoing quoted statement is correct. We shall refer to that statement later under Section C of this argument.

Rule 101, Paragraphs (b) and (e), of the Commission's Rules of Practice, of which this Court may take judicial notice, reads as follows:

"(b) *Rehearing or further hearing.*—When in a petition filed under this rule opportunity is sought to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced."

"(e) *Time for filing.*—Except for good cause shown, and upon leave granted, petitions under this rule must be filed within 30 days after the date of service of a decision or order granting an application in whole or in part, and within 60 days after the date of service of any other character of decision or order."

The first petition for a third hearing (Ex. 2, R. 48), filed March 16, 1951, nearly three months after service of the order, does not show that the evidence the Appellants desired to submit was newly discovered evidence, that it was relevant to the issues involved or that there was any logical reason for not offering it at one of the previous hearings. The following reasons contained in the petition are not logical reasons:

"Such evidence was not available to these Defendants at the time of the prior hearings, *since the prescribed basis was not then known.*" (R. 50.) (Emphasis supplied.)

* * * * *

"Petitioners could not properly assume that the Commission would prescribe *rates lower than the costs to defendants* of rendering the service, and, therefore,

their omission to introduce cost of service evidence at the prior hearings *does not foreclose them from offering such evidence of confiscation at a further hearing.*" (R. 51.) (Emphasis supplied.)

In the first place, Appellants knew what rates were being proposed by the Complainant before the Commission. They were much lower than the Commission prescribed. To illustrate, we show below in cents per 100 lbs. the rates proposed at certain distances compared with the prescribed rates for those distances:

Distance Miles	Minimum 28,000 pounds		Minimum 20,000 pounds	
	Prescribed	Proposed	Prescribed	Proposed
700	101	79	120	94
1200	130	112	145	129
1800	158	138	173	158

(R. 18, 66 and 91)

If the prescribed rates made them want to introduce cost evidence, the proposed rates should have made them much more anxious to offer evidence to show that Complainant's proposal was confiscatory. Instead they sat quietly by until the case had been handled to conclusion and decided on December 21, 1950. Then they waited until March 16, 1951, before they filed their petition for further hearing. (R. 48.)

In the second place, Appellants were presuming a great deal when they charged the Commission with prescribing rates "lower than the costs to defendants." That is a matter of proof. The Commission had a record of considerable size. It knew that Appellants had voluntarily published and

maintained for 12 years to the Southwest rates approximately 50% of the prescribed rates. (R. 16 and 86.) It knew that Appellants had voluntarily maintained and applied for many years rates from California which yield 10.0 mills to 16.4 mills per ton mile while the prescribed rates to the same destinations from Texas would yield from 16.7 mills to 19.2 mills per ton mile (R. 44-A, 45, 87-89.) It takes more than a mere unverified tabulation of figures to convince the Commission that the prescribed rates are lower than costs. It knew that Appellants were not losing money on the rates they have voluntarily maintained and applied for so many years. However, the Commission did reopen the case and reconsider it on the record as made (R. 59 and 60).

Why didn't Appellants ask for further hearing when they filed their exceptions to the Examiner's proposed report? Why didn't they ask for further hearing before the case was orally argued before the entire Commission? The answer is very plain. By waiting to file the petition for rehearing until after the case was decided they hoped to delay the effectiveness of the order for another two-year period. If the Commission elected to not grant a third hearing, then they hoped to get an injunction in the Courts under the plea of confiscation.

The petition for a further hearing to submit new evidence was a plea to the discretion of the Commission, especially since it did not conform with the Commission's rules of practice and had been so long delayed. If the Commission were required to grant such applications it would

become standard procedure for railroads to withhold cost evidence until after a case is decided. Then, if adverse to them, they would ask and obtain a further hearing for the submission of evidence which, if relevant, should have been submitted at the original hearing.

In *United States v. Northern Pacific Co.*, 288 U. S. 490, this Court had under consideration a situation somewhat similar to this case in that the railroads sat quietly by until the case went against them. Then they sought a rehearing. The District Court enjoined the Commission's order. This Court reversed the case and sustained the Commission's order, stating:

"Though the order substantially reduced the carriers' revenues, we do not consider the merits of the application for rehearing, as we think the carriers' lack of diligence in bringing this matter to the Commission's attention deprived them of any equity to complain of the refusal of their petition. They sat silent and took the chance of a favorable decision on the record as made. They should not be permitted to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order." (494.)

In *Interstate Commerce Commission v. Jersey City*, 322 U. S. 503, this Court, at page 514 pointed out the difficulty of ever consummating the administrative process if the Courts required further hearings in cases of this kind. It held that the granting of a further hearing under such circumstances is within the discretion of the body making the

order, not the reviewing body. That holding was reaffirmed in *United States v. Pierce Auto Freight Lines* 327 U. S. 515, 535.

This complaint does not allege any facts showing that the Commission was arbitrary or capricious or that it abused its discretion. Cost studies of the nature shown in Exhibit 2 (R. 48-58) are not relevant in relationship cases of this kind. As stated by Appellants on page 17 of their brief:

"evidence with respect to costs is not usually necessary and it is not the general practice to introduce such evidence."

Contrary to their statement on page 19 of their brief, the decision of the District Court will not require any change in this practice. In relationship cases the level of rates will be determined in the future, as in the past, by the general level of other rates on the same or like commodities moving under similar circumstances or conditions. In revenue cases, such as *Increased Freight Rates, 1951*, 284 I. C. C. 589, the level of rates will be determined in the future, as, in the past, by evidence as to transportation costs.

The complaint, considered in its entirety, clearly shows that the Commission did not act arbitrarily or abuse its discretion in refusing to grant a third hearing to receive further testimony of the nature described by Appellants in their petition of March 16, 1951 (R. 48), and their petition of February 15, 1952 (R. 69).

C. No Allegations That Order Exceeds Constitutional Limits

In their brief Appellants proceed on the theory that they have plead a case of confiscation. They even go so far as to say on page 7 that the District Court admits the existence of confiscation. On page 11 they say:

"This means the judgment of the District Court sanctions the imposition of admittedly 'confiscatory rates.'"

These statements are amazing.

A careful reading of the trial court's opinion indicates that it accepted the statement of Appellants that the gravamen of their complaint was that the Commission had not granted them a third hearing for the purpose of asserting alleged constitutional rights. See the following statement at page 148 of the record:

"The plaintiffs here seek to relitigate a factual question involved in the proceeding before the Commission on which they initially elected not to present evidence."

As we understand the Court's opinion (R. 146-149), it was concerned primarily with the allegations that the Commission was arbitrary and capricious and had abused its discretion. The Court referred to an allegation that the prescribed rates were confiscatory but it granted motions to dismiss on the ground that:

"the complaint fails to state a cause of action." (R. 83.)

Instead of admitting the existence of confiscation, we think the Court understood that the complaint does not even allege confiscation.

Paragraph VII of the complaint (R. 77-78) infers that the prescribed rates are confiscatory, without making that direct allegation. Paragraph VIII mentions "confiscatory rates" (R. 78) but makes no such allegation. Paragraph IX alleges that *the refusal to grant a further hearing* "deprived plaintiffs of their property without due process of law." (R. 78.) Paragraph X (R. 79) alleges that the prescribed rates

"will yield to the carriers affected by the order * * * revenue less than the costs of providing the service covered by said rates."

That is all that is alleged about confiscation. On the other hand, Exhibit 1 (R. 9 to 47), attached to and made a part of the complaint (R. 75), contains the following facts.

The prescribed rates are approximately 200 per cent of the rates on vegetables which Appellants have voluntarily maintained and applied from Texas origins to Southwestern destinations for twelve years. For instance, the minimum revenue per car at 700 miles under the prescribed rates at the 28,000 pound minimum is \$282.80 compared with \$122.66 under the voluntary rates. At the 20,000 pound minimum, the prescribed minimum revenue for that distance is \$240.00 compared with \$146.02 under the voluntary rates. Those rates have now been increased 15 per cent. (R. 16, 66 and 86.) The prescribed charges at that

distance, including the 15 per cent increase, are 231 per cent and 164 per cent of the charges which Appellants voluntarily maintain and apply.

The prescribed rates yield from 16.7 mills to 23.8 mills per ton mile while Appellants have for many years maintained and applied on the same vegetables from California to the same destinations rates which yield only 10.0 mills to 18.8 mills per ton mile. (R. 44-A, 45 and 87-89.) The rates from California apply over routes through the Rocky Mountains over which the Commission has generally prescribed rates 15 per cent higher than in the territory east of the Rockies. *Fresh and Green Vegetables from Idaho and Oregon*, 253 I. C. C. 143, 149-150.

Neither the trial court nor this Court can assume that Appellants have been voluntarily continuing for twelve or more years rates that yield less than the cost of service. The foregoing facts, therefore, completely refute the statement in Paragraph X that the prescribed rates yield less revenue than the cost of service. In case of conflict between the typed allegations and facts shown in the exhibits attached to and made a part of the pleadings, the exhibits control. *Simmons v. Peavy-Welsh Lumber Co.*, 113 F. 2d 812, Cert. Denied, 311 U. S. 685.

The prescription of railroad freight rates involves two steps of substantially different character. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of the rate schedule conforming to that level, so as to eliminate dis-

criminations and unfairness from its details. *Federal Power Commission v. Natural Gas Pipe Line Co.*, 315 U. S. 575, 584.

Cases of the first type are called revenue cases and are illustrated by *Ex Parte* 162, 166, 168 and 175, decided by the Commission in the last six years, the latest decision being handed down April 11, 1952. See *Increased Freight Rates, 1951, Ex Parte 175*, 284 I. C. C. 589. In the latter case the Commission said that the extraordinary defense efforts require a rail transportation system adequate to meet the needs of national defense and "*warrants a degree of liberality* in decision not otherwise to be taken into account" (emphasis ours). It further stated:

"We are not convinced that money necessary for capital additions to the railway system should be derived wholly from income, but we must take note of the fact that many of these outlays are being made under the encouragement, if not the insistence, of the Government and the shipping public, with national defense primarily in mind. Such circumstances; therefore, bear upon our decision in this case." (661.)

Freight rates on vegetables within the Southwest have been increased 71 per cent, with a maximum of 54 cents per 100 lbs, since June 1, 1946, with even greater increases to Official Territory. It is clear from the foregoing statement by the Commission that in revenue cases it has attempted to keep the general level of freight rates high enough to yield a fair return on the value of property used for transportation service. Now it is even going further

and is exercising a degree of liberality beyond that required by ordinary conditions.

The order here under attack was issued in a relationship case of the second type,—not a revenue case. The order was issued for the purpose of lining up the rates on vegetables from Texas to certain destinations more nearly on the level voluntarily published by these plaintiffs from other areas and within the Southwest. The order reduced the rates on carrots from Texas to certain destinations in Official, Western Trunk-Line and Southern Territories. It reduced the rates on other vegetables (except cabbage, onions and potatoes) to a part of Official Territory only. But the newly prescribed rates are still on a higher basis than from Arizona, California and New Mexico to the same destinations and on a higher basis than from Texas to Southwestern destinations.

Exhibit 1 (R. 27) shows that the present per-ton-mile revenue on various vegetables from Harlingen, Texas, to New York City range from 18.3 mills to 20.0 mills per ton mile, compared with 13.5 mills per ton mile from Salinas, Calif. The average distance from Grants, N. M.; to Eastern Territory Group A is 195 miles farther than from Harlingen, Texas, but the average rate is 18 cents per 100 pounds cheaper than from Harlingen (Exhibit 1, R. 21). The rates from Grants, N. M., were voluntarily published by Appellants and connections and must be assumed to yield a fair return.

Appendix B, Exhibit 1 (R. 45), shows rates on carrots from Arizona, California and Texas to fourteen destinations. No rates were prescribed to Chicago, Ill., and St. Louis, Mo. To other destinations the prescribed rates yield from 15.8 mills to 23.8 mills per ton mile, compared with 12.0 mills to 18.8 mills from Arizona and California (R. 45 and 89).

The "due process" clause of the Fifth Amendment can not be invoked without specifically alleging facts from which it must clearly appear that the act complained of will deny to the utility the just compensation safeguarded to it. *Beaumont, S. L. & W. R. R. Co. v. U. S.*, 282 U. S. 74. A mere statement that the prescribed rates yield less than costs and take property without due process of law (R. 79) is not sufficient, especially when Exhibit 1 (R. 9 to 47) and Exhibit 4 (R. 60 to 68), attached to and made a part of the complaint, clearly refute those statements. The voluntary rates from Texas to the Southwest have been in effect since 1940 and the voluntary rates from Arizona, California and New Mexico have been in effect much longer than that, except for general increases. They yield substantially less revenue than the prescribed rates here under attack. The Court can not assume that Appellants would voluntarily maintain and apply sub-confiscatory rates for twelve years or more.

The facts shown in Exhibits 1 and 4 refute the unsupported conclusion that the prescribed rates are less than the cost of service and take Appellants' property without due process of law.

5. CONCLUSION

There is a strong presumption in favor of the legality of administrative action in cases of this kind. Such orders can not be set aside unless the complaint states facts showing the Commission flagrantly violated the legal rights of parties before it. This complaint fails to state such facts. Further, the facts stated show that the Commission did not violate the legal rights of Appellants. Motion to affirm filed by this appellee on July 14, 1952, should be granted and the order of the trial court should be in all things affirmed.

Respectfully submitted,

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Date: December 8, 1952.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing brief upon the parties named below by mailing a copy thereof by first class United States mail properly addressed, to each party.

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Dated at Dallas, Texas, this 8th day of December, 1952.

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